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WORKS OF JOHN C. WAIT

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THE

LAW OF OPERATIONS PRELIMINARY TO CONSTRUCTION

IN

ENGINEERING AND ARCHITECTURE.

RIGHTS IN REAL PROPERTY. BOUNDARIES, EASEMENTS, AND FRANCHISES.

FOR

ENGINEERS, ARCHITECTS, CONTRACTORS, BUILDERS, PUBLIC OFFICERS, AND ATTORNEYS AT LAW.

BY

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PREFACE.

THIS book might consistently have been entitled "Engineering and Architectural Jurisprudence," and have made a volume of an earlier work published under that name by the author. In fact a large part of the material from which this book has been prepared, was collected for the earlier book, and would have been embodied in it had not its size forbidden. The earlier book was a presentation of the law of construction, while this treats of the law attending those operations which precede construction. Such operations are those required for the determination of data and information which should be obtained before a project is undertaken. They comprise the preliminary surveys and investigations to determine the boundaries, the areas, the elevations, the quantities, and the other physical conditions and phenomena that exist and from which the cost, resources, and revenues of the enterprise are estimated. They include an estimate of the value of the natural products, forces, and benefits to be appropriated or utilized in the undertaking, and a determination of the rights and powers to be secured, and of the duties and obligations which attend the carrying out of the enterprise. These are essentially things to be determined before construction work may be commenced, but the misfortune is that they are too frequently overlooked until the time for their favorable acquisition has passed, when they are secured at great cost and expense.

The necessity for such a work as the present one may not be at once apparent, and while the author has no apologies to make for its presentation, he has thought it expedient to explain the occasion for a combined treatment of the subjects of law and construction, and particularly the utility of a work setting forth the legal difficulties met with in Operations Preliminary to Construction. The book has been written for engineers, architects, and those persons engaged in the promotion, organization, construction, and operation of projects usually embraced within the general term of public improvement, or of private enterprises of such magnitude as to be of public interest, first and foremost because there is no book published in English covering the same ground.

Whether the reader be an engineer, an architect, a builder, a contractor, or simply the mechanic who puts his handiwork into the structure, he acts in the capacity, and performs the duties, of an engineer, and practices the honorable profession of engineering; therefore the author may be excused for any

seeming neglect of the distinguished profession of architecture or of the great and respected vocation of contracting and building, or of the numerous industrial trades, if he classes them all in the profession of engineering. All are required to observe certain duties and functions that the law imposes and which are essential to the mutual protection of men, one to another. Among these duties are those of a professional man or public officer who undertakes to serve those who command his skill and knowledge, also those of persons who undertake, either by an express agreement or by mere contract of hiring, to do certain things for a stipulated remuneration, whether it be in a large sum of money or in the simple day-wages of the mechanic or day-laborer. The undertaking to do or perform such services is a representation on the part of the employee that he is qualified and skilled to do or perform what is required of him to the same extent and character as is usual in the profession or trade which he follows. The consideration of these duties that are owing to an employer is one of the things which prompted the preparation of this work.

It is maintained by the author that the same duty rests upon an engineer or mechanic to serve his employer that is due from a physician to his patient or from a lawyer to his client. He is under the same liability for neglect to exercise proper skill and care, and responsible to the same extent for misrepresentations as to qualifications which he does not possess. This rule holds whether the service be in construction, in healing, or in litigation. The professional man owes his best efforts to attain the highest results. The necessity of observing sanitary precautions in engineering and architecture has long been recognized, and the laws of sanitation have been the subject of study and application in engineering for many years. To neglect so important a subject would be a breach of professional practice and would ruin the reputation of any engineer or architect, and the author maintains that it is equally incumbent upon him to observe, understand, and apply the principles of the law. To attain the highest and most economical results, the cost, delays, and vexations of legal controversies should be provided against by a proper regard for the law, in the same manner that the conditions and dangers that threaten health, convenience, and comfort are met by a due consideration of the science of medicine. Upon the practice of civil engineering and architecture depend the beauty, strength, stability, and utility of works; upon the exercise of sanitary engineering depend the fitness, healthfulness, security, and habitability of a structure, or even of a community; and upon the application of legal engineering depend their peaceable possession, occupation, and operation.

Engineering in the past has been chiefly occupied in applying science to the forces and materials of nature, to the acquirement of worldly gain and profit. She has appropriated everything necessary to develop, improve, and utilize the gifts of nature, and to apply them to the necessities and convenience of humankind at the least expense of labor, time, and money. The sciences have been her handmaids, and the mineral and vegetable products of the

earth her materials; and they have been the chief subjects of study. She has been occupied in the creation of the structure, and not in its maintenance and operation. Indeed she has availed herself of anything and everything to promote her advancement, and has incorporated almost every scientific subject and every mechanical trade within her calling. Subject after subject has been taken up and pursued to assist her growth and development, and specialties and branches have been created which have themselves become professions and businesses. That this would be so, was recognized at a very early date, when Sir John Rennie (1761–1821), the distinguished English engineer, said: "Without presuming to underestimate the merits and importance of other professions, that of the civil engineer may be said to embrace everything which can tend to the promotion of the comfort, the happiness, and civilization of mankind." Certainly a consideration of the legal questions presented in construction work was one of those things which the distinguished engineer had in mind.

As well might an engineer, an architect, or a builder have a physician accompany him for advice as to sanitary precautions and arrangements in his works as to require the elbow-counsel of a lawyer to explain the legal status, rights, and liabilities attending their construction and operation. A few decades since he could as reasonably have asked for the attendance and assistance of a mason, carpenter, or blacksmith to instruct him in the qualities and peculiarities of the materials of construction employed, or in their proper use and application, as he can now justify his incompetence to perform the ordinary legal duties of his profession. His duties include everything that conduces to the proper, perfect, and economical construction of the work, and that shall secure the greatest benefit to his employer with the least trouble and cost.

Several minds cannot work together with the clearness, nor decide with the promptness as well as the unanimity, that attend the operations of one master mind. From the earliest times it has been recognized that engineering operations should and must be under the direction and supervision of one head or central authority, which necessitates that that head should be qualified to at least understand and judge of the many questions presented for its determination. For the determination of technical and subtle questions, counsel of specialists, whether of law or medicine, may be sought and obtained, but even in such cases the final determination should be made only after a comprehensive and general consideration of the whole subject-matter by one master mind.

This work, together with the earlier one on the Law of Construction, is intended to give to the engineering professions, including all those vocations and trades engaged in construction work, that general knowledge of legal engineering which is so essential to the complete success of their undertakings and to the highest attainment of professional skill.

All engineering and construction operations deal with land or real prop-

erty, and this book is really a treatment of the Law of Real Property, restricted to such property and the rights inherent therein as are met or employed in engineering and architectural construction. Property is the subject-matter of the engineer's creation. All engineering works require the appropriation and acquisition of property fixed and movable, corporeal and incorporeal. The treatment does not embrace the law of conveyancing or titles, nor the law of inheritance, but the law of property as applied to the materials and phenomena with which the engineer deals, viz., those which are the vehicles of nature's forces and those minerals and metals employed to arrest, transmit, conserve, and utilize such forces.

The first consideration of an improvement is its location. What piece of property will best suit the necessity and convenience of the work? What can be obtained for the purposes and what rights and interests therein shall be secured? What is the relative importance, what the value, of the various conditions, rights, and interests that are presented? What is their relative weight and importance? These questions arise at every stage of progress, in the designing, construction, and maintenance of works. If the design is unalterable, rights and interests must be sought and secured which shall satisfy every need and bear every servitude imposed or likely to grow out of the project. If, as is frequently the case, the property or site for the works has been acquired before the plan of the project has been perfected, then the plans are required to be restricted so as to keep within the rights acquired in such property. The plans must also conform to ordinances and statutes, and must not create burdens which the property will not bear, or which the rights of coterminous owners or the public will not tolerate. Such important technical questions should not be entrusted to half-informed and one-sided men. An engineer cannot take time to instruct a lawyer in the mysteries of science and mathematics, and place before him a lifetime's experience, to enable him to determine some simple question in law, which principles of law can be acquired by a few months' leisure reading on the law of property and contracts. With the engineer rests the obligation of making this combination, for lawyers will not. The technical training should be united with a liberal knowledge of the law of property and contracts, so that the determination may be the result of one effort, by one mind, and to one end and purpose.

It is submitted that almost every act and undertaking in construction work, outside of the ministerial and manual duties which may be delegated to servants and assistants, requires the understanding and exercise of legal and judicial functions which may not be performed without some knowledge of the law. It is to men possessed of these qualifications that the direction of work is given and to whom the management of enterprises is committed. From the first conception of a project to the last payment under the contract, legal questions are constantly presenting themselves for immediate determination, and though such decision may not be final it often defines the position to be

taken and defended. Generally this knowledge so essential to success has been acquired by observation, reading, and experience. The general and technical schools have not taught it, and the lack of it has been a serious drawback to the rapid rise of technically educated young men. Capitalists and companies have been cautious in confiding important questions and works to young men, and older though confessedly less accomplished engineers have been engaged because they have had experience—not because they were better informed in construction or were more competent to design and superintend works, but because they had studied and observed the legal and commercial features attending them.

It is not the mere competency to design, draft, lay out, and superintend work that gives reputation to an engineer. This is work done by assistants who are comparatively unknown to the profession. The men who control and direct the work are men of broad ideas and business capacity, whom companies and proprietors expect will look after their business conservatively and hold their investments secure and profitable. This, it is contended, depends largely upon their business and legal training. Without this training graduate engineers find their many technical qualifications without weight in the estimation of their employers, and they feel it keenly when men with a general education are taken from the ranks of clerk and office help and are given direction of work as superintendents and managers wholly on account of their knowledge of the business policy which directs the financial operations and because they know from association and study how to decide ordinary questions of business and law.

The favor with which "Engineering and Architectural Jurisprudence" was received is sufficient encouragement to the author and the publisher to offer this book, even though there be not, in the legal profession, so apparent a need of it. There are good books upon the subjects treated in this volume, and more complete compilations upon the topics presented; but the present, like the earlier, work has been prepared with special reference to the wants of surveyors, engineers, architects, contractors, builders, and public officers, and is an exposition of the law as applied to the natural subjects, materials, and phenomena attending industrial operations. It is offered primarily to those engaged in the industrial professions who are not familiar with the law, but whose duties require that they should have some knowledge of the rights inherent to the conditions which are frequently presented to them in their work; and secondarily to lawyers in that it presents the views and conclusions of the author based upon twelve years' active experience in engineering and construction work, supplemented by an extended practice in the law and a close study of the cases presented. The book is too small to contain an exhaustive treatment of the law upon the subjects presented, and although there are cited some four thousand original cases besides a large number of references to text-books, it is not offered to the profession of law as a digest from

which to prepare briefs or for general case-hunting. The authorities have been cited in almost every instance mainly to give assurance that the writer is justified in his statements of the law, and to enable the reader, if he be not a lawyer, in case of litigation to direct the attorney to such authorities.

The author owes an apology to the legal profession for the promiscuity of the citations made, and regrets that his time and opportunity have not permitted him to give in all instances references to the official state reports. This is, in a degree, compensated by many references to notes in the magazines, digests, encyclopedias, and unofficial reports referred to, which frequently contain valuable collections of cases upon topics of the law kindred to the case reported, or to the subject under discussion. In many instances a reference to the Table of Cases will give to the reader the official state report in which the case is to be found.

The author is fully aware that he will provoke criticism from the members of the legal profession for any attempts to specialize in the law, and particularly for presenting it within the reach of the layman, it being the avowed policy of the honorable profession of law to condemn every attempt to dispense law to the masses or to make any division of it. To the minds of such persons he would recall the old maxims promulgated and maintained by the legal profession that "Every man is supposed to know the law" and that "Ignorance of the law excuses no man," and that such a policy is in keeping with the old practice of the Roman emperor Caligula (12–14 A.D.), who, according to Dion Cassius, wrote his laws in very small characters and hung them upon high pillars, the more effectually to ensnare the people. It is very well for lawyers, either as legislators or as judges upon the bench, to promulgate the fiction that all men are supposed to know the law and then to discourage and condemn each and every effort to educate the people (or a very intelligent class thereof) in the law. The same objection was made to the preparation and publishing of "Engineering and Architectural Jurisprudence," the argument being made that, instead of assisting laymen to avoid litigation, the effect of the book would be to multiply lawsuits, and that engineers, contractors, and builders, by attempting to be their own attorneys, would lose the efficient services of lawyers, to their own great loss. The author feels assured that neither misfortune resulted, but that, on the contrary, the book has done a great service in avoiding litigation and in protecting the interests of all concerned. To the author all these arguments are seemingly plausible statements of a well-defined policy, developed by the keenest insight of the lawyers' selfish interests. The profession of law is and always has been the most exclusive of professions, and is to-day most jealous of any of the modern tendencies to specialize, and for that reason it is the most conservative and the least progressive. To insist that it is necessary for a lawyer to know criminal law in order to practice in the surrogate's court or in the United States courts in patent and copyright cases is still maintained by some eminent lawyers. For

a mechanical engineer, who desires to know something of patent law, to be required to study all branches of the law, is as foolish as it is to maintain that an engineer who wishes to know something of the law of property and of the rights incident thereto must, before he can apply his knowledge to his every-day duties and the consideration of questions arising in his profession, acquire a thorough and comprehensive knowledge of law. Such arguments may be true for the country practitioner who must attend every ailment of his client, but they have no force in our great cities, where the large interests involved and the sharp competition met, require the physician, the lawyer, and the industrialist to acquire the highest possible skill and efficiency in the particular lines in which he labors.

Another object of this book is to give to engineers and parties engaged in construction a sufficient insight into the law pertaining to the subject and within the purview of engineering, to enable them to decide what facts are essential to the proper and intelligent presentation of a case to a judicial tribunal to secure a favorable determination of the legal questions involved. Usually the engineer, contractor, or builder is the only person upon the work who is familiar with the conditions and events that prevail during its construction. In fact it is the exception that the attorney ever visits the scene of operations. To enable the engineer, architect, or contractor to protect his rights, it is very essential that he should know what those rights are, and to know what events to record, what protests to make, and what proofs to accumulate and present to make out his case. The author will feel that he has done a good service to the industrial professions if he has made such a presentation of the law as will enable the readers of this work thus to fortify their rights and interests.

Two considerations the author would bring to the attention of the reader which were presented in the preface of the earlier work above mentioned, viz., that "it must not be inferred that an engineer can, by a few weeks or months of study of law-books, undertake the practice of law or conduct his own cases in court, or even give advice in regard to matters of law. The author wishes expressly to disclaim any such purpose in the preparation of this work. The *lay* reader should keep constantly in mind that this work is not intended to enable him to go into court to defend an action at law or to prosecute a claim, but is written primarily to assist him in avoiding trouble and litigation, and to aid him in protecting his employer's and his own rights when they are assailed. If a man's rights are usurped, he had best consult a man who makes some profession of knowing what his rights and liabilities are; if they involve his spiritual as well as his legal status, he will consult his pastor; and if there be questions involving engineering and architecture, he may reasonably be expected to consult his engineer or architect.

"It is hoped that the book will fulfill another mission—that of guiding and strengthening the younger and inexperienced members of the industrial

professions in a proper understanding and appreciation of business and business relations. Young men in the engineering and architectural professions often obtain in their technical-school training a contracted view of their professional duties and labors. They are likely to narrow their professional work to the ministerial duties of the drafting-room, the shop, or the field. Too many well-trained and educated men remain in the shop or drafting-room, while less skillful men from the counting-room and office, but with a good business experience, become superintendents, managers, and presidents of the concerns employing them. The education of an engineer should fit him for a higher sphere than that of a delineator of lines. Supplemented with a good business experience, his training eminently fits him for the direction and superintendence of large works; and that is his proper field. If this book cultivates in young men a better appreciation of business relations and business principles, and a due sense of their duties, liabilities, and responsibilities, one of its chief missions is accomplished."

The completion of this book has been delayed by professional work which has increased in volume as each year and month have passed by, until the author, and the publisher, too, almost despaired in their hopes of seeing it in print. Then came the author's appointment as Assistant Corporation Counsel to the City of New York, since which time he has been simply overwhelmed by the work of that office, together with what has been required to conclude the book. Its completion has been accomplished only by heroic efforts and by the most industrious use of the hours of the night. In fact the work from the beginning has been compiled and prepared in extra hours that the author has conserved from a very busy life, there having been no time in its preparation during which he has not been in active professional work. Some errors may reasonably be expected under the circumstances, and for such the author begs the indulgence of his readers.

The author desires to acknowledge his indebtedness to several of his associates for valuable assistance rendered in the arrangement and preparation of four or five of the shorter chapters: to Mr. Newell Lyon in the preparation of Chapters XXIII and XXIV, and to Mr. James B. Cauthers in the preparation of Chapters IV and XXXV, both gentlemen having been associated with the author in the practice of law at the time; and also to Mr. F. W. Carpenter, C.E., who gave valuable suggestions after reading the manuscript before it was sent to the printer. The author wishes also to mention the efficient and faithful services of his stenographer, Miss Katharine J. Cusack, whose assistance and untiring interest in the preparation and completion of the book have been most commendable.

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THE LAW OF OPERATIONS PRELIMINARY TO CONSTRUCTION IN ENGINEERING AND ARCHITECTURE.

PART I.

PROPERTY. ESTATES IN, AND TITLE TO, REAL PROPERTY.

CHAPTER I.

INTRODUCTION. PROPERTY DEFINED.

1. Introduction.—Before beginning the construction of an engineering or architectural structure or plant, it is essential to secure the land for a site or a right of way and those natural features incident to, or contained in, the land the purpose of which it is the prime object to utilize. Whether the object be the appropriation of wealth contained in Mother Earth, or the harnessing and utilization of Nature's forces, or the development and enjoyment of the industrial, commercial, and traffic privileges necessary to the comfort of mankind, the first step is to secure such rights and privileges.

Nothing of construction should be done until these rights have been secured and their ownership or control determined positively. The success of an enterprise cannot be assured until these questions are passed upon and settled, and it is determined by the far-sightedness and prophetic discernment of men of close observation and study. Such questions are usually left to, and determined by, promoters, bankers, business men, and lawyers, and it is the legitimate business of the last-named class. These men are controlled chiefly by the strictly legal, commercial, and revenue-paying features of the enterprise without regard to the construction and operation features of which they know and realize so little. The requirements of the structure itself, the effects of its operation, or its very existence even, the things which affect its stability, preservation, and life, what changes and additions will be

necessary to its growth, development, and expansion, are considerations which are too often overlooked and neglected.

These are legitimate things for the lawyer to consider if he can be brought to realize the importance of them, which he does not, but "Sufficient unto the day is the evil thereof" is too often his motto.

Without practical experience in engineering and architectural operations, or in the management of estates where large building operations have been carried on, the average lawyer has little opportunity to study or observe what are the results and requirements that attend these operations. Moreover, lawyers are a very busy class of men, absorbed in many different cases, with varying conditions and circumstances, and they do not, and cannot, give to one case the close study and observation that an engineer in charge of work can devote to it. The erection of the structure is the one and perhaps the only case in hand with the engineer in charge of the work. It receives his careful inspection by day and his thoughtful study by night. It is his work, becomes a part of his daily life and of himself. How can a lawyer upon a meagre statement of facts about a subject (a structure) of which he has only a most superficial knowledge, or upon a cursory examination of matters and phenomena of which he is equally ignorant, be expected to give judgment that will square with that of an engineer who, with a general knowledge of law, has had time and opportunity to study the case and look up the law in regard to it?

"Be sure you are right and then go ahead" is a good motto for the engineering profession as it is for business men, and it is applicable in many more instances in the daily practice of engineers and architects, contractors and builders, than in any other vocation. "But how are we to know beforehand that we are right?" ask these fabriarchs of the nation's weal.

The successful undertaking and operation of an enterprise require the thoughtful consideration of many questions. In the usual course of business there is a preliminary examination and report of the engineer upon the feasibility of the project and the difficulties attending its construction, an estimate of the probable cost of construction and operation, and the comparison of these with the anticipated revenues, and the clear presentation of these subject-matters to probable investors. This is the scope of the usual investigation as embodied in the report, but the lawyer and engineer or architect should have in their private memoranda much that is not embodied in the report submitted. Their investigation must include much more. It should contain a review not only of present actualities, but of future possibilities and probable consequences. It should foresee the probable invasion of, or the interference with, the rights of others. It should anticipate the growth and expansion of the works, the increased traffic likely to result, the growing demands that may be made upon the structure, alterations rendered necessary by change in the motive power or means employed, connections

and terminal facilities, the necessity of auxiliary plans or ways to supply or promote traffic, the possibility of rival competition, and the thousand and one questions which arise in connection with these questions.

The first and fundamental acquisition to the government is property, land, or territory, and the first essential thing to an engineering enterprise is property (land), the foundation upon which the structure may stand, namely, a site—a site free from defects of soil and impervious to influences that may undermine and destroy the works; a site unclouded with defects of title, unencumbered with easements and burdens which provoke expensive and ruinous litigation; a site free from the dangers of injunction and the embarrassments of competition.

These are considerations which do not always enter into the determination of a site, right of way, or location for engineering works, yet when brought to the attention of business men their importance is fully appreciated, and the professional man or employee who shows a due and proper consideration for such questions is pretty certain also to be appreciated.

To understand and realize the importance of these questions requires a fundamental knowledge of the law of property, of the rights incident thereto, and of the burdens attendant thereon.

Almost all, if indeed not all, of the operations in engineering and architectural construction have for their object the improvement or utilization of property. Sometimes such operations require the destruction of property or of rights in property, but this is seldom the object of the operation. At all times they involve the use of property, not only for the site of the structure, but as materials of construction. These questions must always be considered before construction work is begun, and it is apparent that in treating the subject of the Law of Operations Preliminary to Construction the first consideration is that of property itself and of property rights. A large part of the book will be devoted to the law of those property rights which must be considered in projecting new enterprises and in carrying out and completing works. It will be necessary, therefore, to define briefly many of the terms which the reader will meet, such as property in its various characters and conditions, and the kinds of property, together with the means by which it is conveyed, and the estates therein created.

2. Definition of Property.—Property, in the strict legal sense, is that right to the use and disposition of a thing which one may lawfully exercise to the exclusion of all other persons. The term is often used to indicate the thing itself which is the subject of the property, rather than the intrinsic right itself. The word extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal interests. It includes everything that is the subject of ownership.

Property has been defined as being the right to possess, use, acknowledge,

and dispose of a thing. Labor has been held to be property. A person's knowledge which is the result of training, education, and application upon the part of the possessor has been held to be property. The profession of a priest has been held to be his property, and the prohibition of the exercise of that profession without a hearing is contrary to the law of the land.[1] A prospective patent has been held to be property under the law authorizing the issue of stock in consideration of labor or property.[2] A right of action has been held to be property as much as a corporeal possession.[3]

A mistaken belief frequently entertained by laymen is that because one owns a thing he can make whatever use of that thing he may choose. One seldom can say that he absolutely owns anything. Land is subject to taxation, easements, and other burdens too numerous to mention. Streams are subject to water privileges, water rights, and easements not only of riparian owners, but of the public in general. Streets, though owned by abutting owners, are subject to easements of the public for travel, and in some jurisdictions to numerous other burdens and easements. The owner of land may improve it, but frequently he is required to conform to certain ordinances or police requirements, and to maintain it in such a manner as shall not injure or threaten injury to other persons or to other estates. He may be the creator of a new thing, but he must protect it and be reasonably careful that it does no harm to others. The laws require of him that he shall treat his own offspring with such discretion and consideration as are in keeping with good morals and public policy. One can hardly be said to be the absolute owner of anything in the sense that he may make whatever use of the object of the ownership he may see fit. Property in anything is not absolute, and one has not an unqualified control of anything he may own and possess. It is the proper and consistent use and enjoyment of the thing so as to not prejudice the privileges, enjoyment, and rights of others.

3. Real and Personal Property.—Property is divided into two classes, *real* and *personal.* Real property is property in real things, and real things are such as include lands, tenements, and hereditaments. An accurate definition includes such things as descend to the heir. The visible object which lies at the foundation of all real property is land, but all rights in land are not included in real property. Tenements do not refer to the physical nature, but to the peculiar manner in which they are held, the term being, however, not coincident with the word "land," but (1) they include lands in so far as the interests therein are real property, and (2) larger than lands, including certain other rights capable of tenure, such as offices. Hereditaments (such things as descend to an heir) is a larger term, but it does not include all of the former, since there are certain estates in tenements which are in their nature incapable of inheritance, such as an estate for life, yet they have

[1] O'Hara *v.* Stark, 90 Pa. St. 477. [2] Whitehall *v.* Jacobs, 75 Wis. 479.
[3] Power *v.* Harlow, 57 Mich. 111.

all incidents of real property. In this country, both by statute and common law, the term real estate is generally used for the words lands, tenements, and hereditaments. In different States the definition may vary slightly, and the fine distinctions are hardly worth going into for the purpose of this book.

Hereditaments include everything which may descend to the heir at the death of the owner. They are usually divided into corporeal and incorporeal, or, in other words, into two classes, one of which has a material existence, and the other only an existence in effect, as the right to some profit or use in land. Tenements properly means all things that can be held in tenure at the common law. It includes more than the word "lands," comprising lands and the rights issuing out of, and concerning, lands.

4. Land.—Land is the surface of the earth, with whatever is attached to it by nature or by the hand of man, and all that is contained within or below it. Land comprehends all things of a permanent, substantial nature, being a word of very extensive signification. As defined by Sir Edward Coke,[1] "Land comprehends in its legal signification any ground, soil, or earth whatsoever, as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includes also houses, castles, and other buildings; for they consist," said he, "of two things: land, which is the foundation, and structure thereupon, so that if I convey the land or ground, the structures and buildings pass therewith. Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. It includes not only the face of the earth, but everything under it or over it. If a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and his meadows."

In like manner the owner of land is held to be entitled to the possession and ownership of what naturally falls upon his land, such as rain, hailstones, etc. In the Supreme Court of Iowa it was held that an aerolite or meteor which fell from the sky was the property of the owner of the land on which it fell, rather than of the person who first found it and took it up.[2]

5. Use of the Word "Land."—The word "land" is sometimes restricted in its application, as in mechanics' lien laws, where certain priorities are given and preferred to the extent of the value of the land at the time of the making of the contract with the mechanic or materialman. Land in such a case has been held to mean only the ground with such improvements upon it as existed at the time of the execution of the contract or mortgage.[3]

In a statute, under a strict construction, the word "land" has been held *not* to include an easement. An incorporated waterworks company which was empowered to lay pipes in the streets, roads, etc., and did lay pipes accordingly, was assessed with the land tax as holders of land in a district within which it had laid pipes down, but in which it had no other property. It was

[1] 2 Bl. 16.

[2] See Chicago Law Jour., Nov. 24, 1892.

[3] 12 Amer. & Eng. Ency. Law 655.

held that it was improperly assessed with the tax.[1] The word "land" will include an easement if such construction appears to be in accordance with the intention of the legislature.[2]

A bridge has been held to be land within the meaning of the charter of a turnpike company which was required to pay to the owners of the land over which the road should pass all damages sustained, whether the county owned the fee of the land in the bed of the river over which it was erected or only the easement to maintain a bridge there.[3] The track of a railroad company affixed to the land is "land," and is liable to taxation even though the fee of the land on which the track is laid is not included in the conveyance.[4] So are the pipes and mains of an aqueduct company which are laid through fields and highways.[5] Telegraph-wires strung upon the poles of a railroad company on its right of way, under an agreement by which the telegraph company was to operate the line and the railroad company to purchase the wires upon the termination of the agreement, pass under a sale of judgment of foreclosure as real estate, and the purchaser may restrain the telegraph company from removing the wires by an injunction.[6]

Land, within the meaning of the word as used in the statute in reference to property being liable to taxation and assessable as such, has been held to include the tunnels, track, substructure, superstructure, stations, viaducts, and masonry of the New York and Harlem Railroad, situated on and under Fourth Avenue, in the city of New York.[7] The court held that, as regards taxation, it is immaterial whether a railroad is laid upon the surface, placed upon pillars, or carried through a covered way or tunnel. The structure adopted to sustain it or facilitate or protect its use is, within the meaning of the term, "land," and for it the company is liable to be taxed.

Under a statute relieving the track of a railroad and the land on which it was constructed from taxation, and declaring that they shall not be deemed real estate, it was held that this release from taxation was limited to the franchise or right of way, and did not include the depots, engine-house, turntables, car-house, and other buildings or erections.[8]

6. Personal Property.—Personal property embraces all objects and rights which are capable of ownership, except freehold estates, lands, and incorporeal hereditaments issuing therefrom or exercisable within the same. There are certain kinds of personal property which are intimately identified

[1] Governor *v.* Bowley, 17 Q. B. 360.

[2] Gr. Western R. *v.* Swindon R. Co., 52 L. J. R. Ch. 306; s. c., 53 L. J. R. Ch. 1075.

[3] Freeholders *v.* Redbank Tpk. Co. (N. J.), 3 C. E. Green 91. *And see* State *v.* Tichenor, 51 N. J. L. 345, and Cleveland, etc., Ry. Co. *v.* Knickerbocker Trust Co., 86 Fed. Rep. 73.

[4] People *v.* Cassity, 46 N. Y. 46; Neary *v.* Philadelphia, etc., R. Co. (Del.), 9 Atl. Rep. 405 [1887].

[5] Willard *v.* Pike (Vt.), 9 Atl. Rep. 907 [1887].

[6] N. Y. O. & W. R. Co. *v.* Western U. T. Co., 36 Hun 205 [1885].

[7] People *v* Commrs. of Taxes, 101 N. Y. 322 [1885].

[8] P. S. & P. R. Co. *v.* Saco, 60 Me. 196. *See* Providence Bank *v.* Billings, 4 Pet. (U. S.) 563, and Phila. & Wilmington R. Co. *v.* Maryland, 10 How. (U. S.) 393.

with real property and are subject to some of the rules governing the latter. These are: (1) heirlooms, which are personal chattels, and descend to the heir together with the inheritance in accordance with custom; (2) growing crops, which pass to the executor and not to the heir; (3) emblements, which are the right of the tenant to the profit of his crops; (4) fixtures, which are personal chattels that a temporary possessor has annexed to the land and that by law he may take with him when he leaves; (5) several kinds of personal property, such as domestic animals and wild animals under certain qualified rights; (6) property in ships, governed by special laws of registry; (7) moneys and special kinds of securities, such as negotiable paper, insurance policies and annuities, patents, copyrights and trade-marks, seats in exchanges, debts and demands, including those of guaranty and suretyship, shares of stock, good-will, names, and proprietary secrets.

The term "personal property" includes the same kind of property as the word "chattels," and chattels are divided into two classes: *chattels real* and *chattels personal*. *Chattels real* are interests which issue out of, or are annexed to, real estate, and which cannot be moved from place to place. Such is a lease of land for a term of years. It is a chattel though the rent be only nominal and the term be ninety or a thousand years. Any interest in land that is less than a freehold is a chattel real.

A house built upon blocks or pillars for permanency, and not to serve a temporary purpose, becomes part of the land; but if it be sold and removed, it then becomes a chattel.[1] If a person enters upon the land of another without his permission and builds a structure thereon in a permanent manner, the structure will become a part and parcel of the land. When a building has been erected upon land, with the consent of the owner, for the benefit of the builder, it will be the personal property of the builder, and it will remain so though the land and building be sold to different persons.[2]

Chattels personal are things movable which may be annexed to or are attendant on the person of the owner, and may be carried about with him. Such are animals, household goods, money, jewels, corn, garments, etc. The term includes every kind of property which lacks the two essentials of real estate, viz., immobility and indeterminate duration as to time, and also such things as are not attached to real estate. Chattels personal are also divided into corporeal and incorporeal things. Corporeal things include all things being in themselves capable of motion or of being moved, and that may be perceived by the senses, and may be seen, touched, and taken possession of. Animals, alive or dead, manufactured goods or materials, and everything capable of being attached and not affixed to the soil are included in this class. Incorporeal things are such as a man has not the occupation of,

[1] Salter *v.* Sample, 71 Ill. 430; Railroad *v.* Goodwin, 111 Ill. 273; Parish *v.* Jones, 8 Cush. (Mass.) 184.

[2] 3 Amer. & Eng. Ency. Law 166, *citing New England cases.*

but merely has the right to occupy, the possession of which, however, he may recover by an action at law, whence it is called a *chose in action.**

7. Fixtures.—The subject of fixtures is one that is of special interest to persons contemplating construction work. Many structures erected and many improvements undertaken, are placed upon land not owned absolutely by the builder or owner of the improvement. Such structures may be built only for temporary uses or with a view to being removed, and it is therefore important that the property in them be understood and determined.

A *fixture* is an article which was a chattel, but which, by being annexed or affixed to real property by some one having an interest in the soil, becomes a part and parcel of it. The annexation may be actual or constructive. Removable fixtures are those which the person annexing them to the land may legally remove against the will of the owner of the land. In ascertaining whether or not a particular thing is a fixture, the courts have agreed upon certain rules to be applied to decide if the article in question be a fixture. These rules have been reduced to three, which require (1) that the thing in question shall be actually annexed to the realty or to something pertaining thereto; (2) that it should be appropriate to the use or purpose of that part of the realty with which it is connected; and (3) that there should have been an intention on the part of the one making the annexation that it should be a permanent accession to the freehold. The intention to make the annexation may be inferred from the following facts: (*a*) The nature of the article annexed; (*b*) the relation of the party making the annexation; (*c*) the structure and mode of annexation; (*d*) the purpose and use for which the annexation was made.

In many cases the question as to whether or not the chattel could be removed without injury to the freehold or to itself has been held important in deciding whether a certain article was a fixture or not.[1] This rule is not all-controlling. Many cases hold that the intention of the party making the annexation is the chief element to be considered in determining what are fixtures, others that it depends upon the expressed or implied understanding of the party concerned, and other cases hold that the test is the adaptation of the article to the uses and purposes to which the realty is applied.[2]

Whether or not a particular article is a fixture is a mixed question of law and fact. There is great conflict both in the text-books and adjudged cases as to what is such an annexation of chattels to realty as to make them a part of the realty and to pass them by a conveyance of the realty. Any attempt to reconcile the authorities of the different states on the subject would be futile, and to review them would be an endless task. Some instances are given which will benefit engineers, architects, and surveyors, and guide them in the con-

[1] 8 Amer. & Eng. Ency. Law 43. [2] 8 Amer. & Eng. Ency. Law 44.

* *See* Part IV, Secs. 641–861, *infra*.

sideration of other cases which may come up in their practice, but these same cases might be decided differently in different states.

Some chattels are held to be fixtures though they are not annexed to the realty. Articles, whether fast or loose, necessary or convenient for the construction of one kind of business and which would be useless in another, if they be indispensable in carrying on a specific business become a part of the realty. Such reasoning, however, is not to be applied to live stock as upon a farm. Articles which have been needed for use in connection with the premises, and which are more or less necessary to their enjoyment, are sometimes held to be annexed constructively. A millstone detached from a mill for repairs, or by accident, has been held a fixture. Title-deeds, deer in a park, and fish in a pond have been held to belong to and to pass with the estate. Windows, doors, blinds, Venetian blinds, fences, etc., belong to the land as being constructively annexed to it. An engine actually affixed to and in the soil, and which cannot be removed without tearing down the masonwork and house which cover it, is a fixture. A steam-engine and boiler bought by the owner of a mill and left upon the ground with an intention of placing them in the mill were held to become a part of the realty. Wood-working machinery in a sawmill was held to pass on the sale of the real estate. Engines and machinery for a sawmill erected by lessees under agreement with the landlord that they should have the right to remove them at the end of their term are held as fixtures by the purchaser of their interests in the real estate under the lease. Machinery, though generally regarded as personal property, will, when erected by the owner of land for the better enjoyment of the freehold, pass to his heir, and does not belong to the executor. When machinery goes to the heir, all parts that belong to that machinery, although capable of being detached and of being used in a detached state, go with it. Looms, cards, spinning-frames, etc., fastened to the floor in a cotton-mill to steady them, have been held not fixtures. Machinery annexed in a substantial manner to the building has been held not a fixture, unless there was a unity of title to the realty. Electric-light wires fastened to poles in the street and connecting with the plant have been held a part of the machinery, and to pass in a mortgage upon the lot upon which the plant is situated.

8. Agreements in Regard to Fixtures.—In construction work, materials and machinery are sometimes purchased and delivered with the express understanding and agreement that the title therein shall not pass until the goods are paid for; and the effect of such an agreement upon the rights of other parties is a matter of interest, as well as the effect upon the ownership of the materials themselves.[1] Rails and other property purchased and affixed to a part of the railroad were held by the lien of the mortgagee in favor of a good-faith creditor as against any contract, between the furnisher of the

[1] *See* Wait's Engin. & Arch. Jurisp., Secs. 271–273.

materials and the railroad company, containing stipulations that the title to the property should not pass until paid for.[1] However, if this contract between the materialman and the railroad company had been registered in the town or county clerk's office, so that the mortgagees or their representatives had constructive notice thereof, the case might have been decided differently.

It has been held that intention of alteration will not convert a chattel into a fixture. It is not the intention to make a thing annexed to or placed upon the freehold personal property that alters its legal character as a fixture, but the intention to make a permanent or temporary annexation. Erections made by the owner of real estate are presumed to be permanent. Machinery may remain chattels for all purposes even though attached to the freehold by the owner, if the mode of attachment indicates that it is set up for more convenient uses, and not to make it an adjunct of the building or soil.

Tapestries, pictures on panels, frames filled with satin and attached to the walls, statues, figures, vases, and stone garden-seats have been held in England to be fixtures. The conveyance of a sawmill and appurtenances passed title to the chains, dogs, and bars which were in place when the conveyance was made. An organ in a church affixed in a recess made on purpose for it, was held a fixture.

A house, mill, and machinery sold to the owner of land on condition that they should remain personal property, with title in seller until paid for, do not become incorporated in the realty until the conditions are fulfilled.[2]

A mortgagee is entitled to buildings which are on the premises of the mortgagor at the time that the mortgage was given, notwithstanding the fact that the life-tenant and mortgagor had agreed that the buildings should remain personal property; and the purchaser at sale on foreclosure is entitled to the same forever.[3]

In New York it has been held that the fixtures must be of such a nature as to be capable of becoming personal property in order to subject them to an agreement of this kind. Thus, a house or building that from its size or the materials of which it is built or the manner in which it is attached to the land could not be removed without practically destroying it, would not become a mere chattel by means of any agreement that might have been made concerning it. So it has been held of the separate materials of a building, and of things fixed into the wall which were essential to its support. It was held impossible that they should be subject to an arrangement between the owners by which they should become chattels.[4] Buildings erected by the

[1] Porter *v.* Pittsburg Steel Co. 122 U. S. 267; Dunham *v.* Railroad Co., 1 Wall. (U. S.) 254; Fosdick *v.* Schall, 99 U. S. 235–251; Dillon *v.* Barnard, 21 Wall. 430; Hunt *v.* Bay State Iron Co., 97 Mass. 279.

[2] Harkey *v.* Cain (Tex.), 6 S. W. Rep. 637.

[3] Stevens *v.* Rose (Mich.), 13 West Rep. 765.

[4] Ford *v.* Cobb, 20 N. Y. 344. *And see* Fortman *v.* Gupper, 14 Ohio St. 558.

license of an owner of the land by another person upon the land of the licensor pass to the good-faith purchaser of the land who has no knowledge of the license.[1] When personal property is wrongfully annexed to the realty by the owner of the land, the remedy for the wrong is against the wrong-doer, and not against an innocent purchaser of the land.[2] A building constructed upon land is real property, and it is not converted into personal property by being blown down by a tempest. The fragments still belong to the realty.[3]

Railroad ties wrongfully annexed to the right of way by a subcontractor become a part of the railroad, and trover will not lie against the railroad company for their conversion.[4] Fixtures erected by one person upon the land of another, by license or agreement, pass under conveyance of the land to the purchaser in good faith.[5]

Agreements are frequently made between the parties who may lay claim to the fixtures to determine the character of annexations to real estate. Such contracts frequently make personalty what the law regards as realty, and what the law regards as personalty they seek to make realty, and it is often held that such agreements will be enforced. This purpose is subject, however, to several modifications. An agreement between an owner of land and the owner of fixtures that the latter shall remain personal property cannot affect the rights of a *bona-fide* purchaser of the land.[6] In general, it may be said that fixtures pass to the purchaser in good faith of real estate, notwithstanding an agreement between the owner of the land and the seller of the fixtures that they shall remain personal property. A purchaser in good faith must not, of course, have had notice of such an agreement, because with such notice he is not a *bona-fide* purchaser. Such agreements are valid between the parties making them when the rights of third persons are not affected.[7] Such an agreement generally will be governed by the statute of frauds,[8] but some cases have held that the agreement may be proven by parol evidence.[9]

Where a purchase-money mortgagee verbally agreed with the grantee of the mortgagor that, on payment to him of a sum sufficient to entitle the grantor to the conveyance, he might remove the plant of a marine railway on the

[1] Price *v.* Case, 10 Conn. 375. *And see* Priestly *v.* Johnson, 67 Mo. 632. *Also* Tapley *v.* Smith, 18 Me. 12.

[2] Voorhees *v.* McGinnis, 48 N. Y. 278. *See also* Fryatt *v.* Sullivan Co. (N. Y.), 5 Hill. 116; Frankland *v.* Moulton, 5 Wis. 1; Woodruff. etc., I. Wks. *v.* Adams, 37 Conn. 233; Mott *v.* Palmer, 1 N. Y. 564, Knowlton *v.* Johnson, 37 Mich. 47.

[3] Rogers *v.* Gillinger (Penn.), 6 Amer. Law Reg. 430 [1858].

[4] Detroit & B. C. R. Co. *v.* Bush, 43 Mich. 571.

[5] Prince *v.* Case, 10 Conn. 375; Wilgus *v.* Gettings, 21 Ia. 177; Roswand *v.* Anderson, 33 Kan. 264; Hoax *v.* Seat, 26 Mo. 178; Havan *v.* Emery, 33 N. H. 66; Powers *v.* Dennison, 30 Vt. 752.

[6] Roswand *v.* Anderson, 33 Kan. 264; Bartholomew *v.* Hamilton, 105 Mass. 239; Lacustrine Fer. Co. *v.* L. G. & Fer. Co., 82 N. Y. 476; Smith *v.* Wagoner, 50 Wis. 155.

[7] Badger *v.* Batavia Paper Co., 70 Ill. 302; Sisson *v.* Hibbard, 75 N. Y. 542; Eaves *v.* Estes, 10 Kan. 314; Otto *v.* Specht, 11 Cent. Rep. 244.

[8] Myers *v.* Schemp, 67 Ill. 469; Trull *v.* Fuller, 28 Me. 545.

[9] Frederick *v.* Devol, 15 Ind. 357; Walker *v.* Schindel, 58 Md. 360.

premises, it was held that the agreement was binding.[1] Fixtures erected by a person in possession of land under a contract of purchase from the owner become a part of the realty.[2]

Without an expressed agreement or a stipulation which permits the removal of fixtures after the expiration of the term, fixtures must be removed during the time for which premises are rented and while the relation of landlord and tenant exists under the original lease. It does not matter whether the lease expires or is terminated by re-entry on forfeiture. When the tenancy is uncertain as to length of time, as when it depends upon a contingency such as tenancy for life or at will, the law allows a reasonable time for the removal of fixtures. A tenant who goes upon the premises after his lease is terminated is a trespasser. If a new lease is taken for the same premises, which is to date from the expiration of the old lease, without stipulating for the removal of fixtures erected by him during the tenancy which has expired, he cannot remove them at the end of the renewed lease.[3] The act of leaving fixtures on the premises after the expiration of the term leads to the presumption that they are abandoned to the landlord. This presumption may be rebutted by proof of an oral agreement to remove them after the expiration of the term.

If a tenant is prevented by the owner of the land from removing his fixtures within the time allowed by law for their removal, trover will lie in favor of the tenant. If, however, fixtures are allowed to remain after the expiration of the lease and the time allowed by law, it has been held that the tenant could not maintain an action. The action will also lie in favor of the owner of the land after the unlawful removal of fixtures by the tenant. If not permanently annexed to land, the owner may bring an action for replevin. An action of ejectment has been allowed to enforce the agreement for the common use of fixtures erected at the joint expense of tenants in common. An injunction will be granted to restrain a mortgagor or his grantee from removing fixtures that are permanently annexed to the freehold.[4]

The courts and text-book writers are not agreed on the question as to whether or not railroad rolling-stock is personal property or a fixture. The tendency seems to be to regard them as property fixtures.[5] In Arkansas, Missouri, Nebraska, New Hampshire, New York, Ohio, Texas, and West Virginia, railway rolling-stock is regarded as personalty. In Illinois, Kentucky, and Georgia it is covered by a mortgage on the railroad; in Wisconsin it is by statute a fixture.[6]

[1] Tyson *v.* Post (N. Y.), 15 N. E. Rep. 316

[2] 8 Amer. & Eng. Ency. Law 57.

[3] 8 Amer. & Eng. Ency. Law 63.

[4] *See* 8 Amer. & Eng. Ency. Law 65.

[5] Williamson *v.* N. J. So. Rep. Co., 6 Cent. L. J. 381 [1878], many cases cited.

[6] 8 Amer. & Eng. Ency. Law 64.

CHAPTER II.

OWNERSHIP OF LANDS. ESTATES.

11. Estates.—For the purposes of this book, an estate in land may be divided into two general classes, viz., (1) exclusive or entire, and (2) special or limited, and without reference to the period of holding. If one has the exclusive enjoyment of all the rights, interests, and profits of an estate he is the owner in fee simple, and then his ownership is exclusive and entire. If, on the other hand, he has only a special or limited right to the enjoyment of an estate, then it belongs to the second class. This book will have largely to do with the second general class of estates. Such are rights to certain profits, interests, and rights in land, as those of the soil, minerals, water, oil, gas, or vegetable growths; or of any rights of way upon, over, or through the lands.*

Real property or real things are owned, held, or possessed by one or several persons or parties in varying degrees, natures, extents, and interests, which are called estates. These are classified as follows: estate of freehold; estate of inheritance; estate in fee; estate tail; estate for life—estate for the life of another, curtesy, dower, homestead; estate for years, estate at will, estate from year to year; joint estates, joint tenancy, tenancy in common, coparcenary, estate by entirety, estate in severalty; estate on condition—mortgage; estate in remainder; estate in reversion; estate in possession, and estate in expectancy.[1]

For the purposes of this book, it is not required to go into an exhaustive treatment of the subject of estates. A general explanation of those usually met by promoters and constructors of works should suffice. If the estates in lands upon which it is proposed to erect works is anything but the simplest estates, the questions involved, or likely to arise, should be referred to counsel for advice.

12. Estate of Freehold.—An estate of freehold is an estate of inheritance or for life or for some indeterminate period in real property. It is an estate supposed to be that of a free man, and nothing less than a life estate falls within that class. The peculiar feature of such an estate is that it lasts for an uncertain length of time. A term for a certain number of years, therefore, is

[1] 6 Amer. & Eng. Ency. Law 875.

* *See* Part II, Secs. 51–360, *infra*.

not an estate of freehold. The word is used to designate the quantity of an estate rather than the quality of the ownership.

13. Estate of Inheritance.—Such an estate is an estate in lands that may descend to the heirs of the owner. They include estates in fee and estates in tail.

14. Estate in Fee Simple.—This is the largest estate in land known to the law. It is an estate of inheritance unlimited in duration. The owner of an estate in fee simple is often said to possess the fee of the property. One who owns the fee of a piece of land has full power to dispose of it at any time during his life. If not disposed of, at his death, it goes to his heirs. To-day an estate in fee cannot be created anew, but the rules formerly applied to the creation of such estates are now applied to their transfer. It is absolutely essential to the creation or transfer of an estate in fee by deed that the conveyance be expressed to the grantee and his *heirs*. Without the word "heirs" the estate conveyed will be merely an estate for the life of the grantee. This rule is not strictly applied in *wills*, however, and any words which show an intention to mean heirs will pass the fee.

In America the rule forbidding the transfer of property in fee without the use of the word "heirs" has been frequently ignored in deeds and leases by statute. A conveyance to a corporation does not require the word "heirs," and a conveyance to a trustee does not require any particular form to create the trust. A trustee may take the fee without the word "heirs," where a less estate would not satisfy the purpose of the trust; and *vice versa*, the trust estate does not continue in equity any longer than is necessary to accomplish the trust. If a devise of lands be personal and with the payment of money, the devisee takes the fee, whatever the expression used. A court of equity will sometimes dispense with the use of the word "heir." By the rule in Shelly's case, an estate given to a man for life, with the remainder to his heirs, becomes an estate in fee directly in the ancestor. The rule applies only where the word "heirs" or its equivalent is used, and the intention of the grantor must be ascertained by the ordinary rules of construction. In some states this rule is abolished and the heirs take a contingent remainder.

An estate is sometimes said to be in fee which is determinable when it is liable to be determined by some act or event. In such case it is deemed a fee because there is a possibility, if not a probability, that it may last forever.

15. Estates Tail.—If an estate of inheritance be limited to a usual or particular class of the issue (offspring) of a grantee, it is a conditional fee and is called an "estate tail." If the issue fail, the estate reverts to the grantor. Such an estate is inalienable, but has all the other characteristics of a fee simple. The proper words of limitation in the creation of an estate tail are that it shall go to the heirs of the body, and the word "heirs" is necessary in a deed, while an equivalent expression is allowed in a will. An estate tail is either general or special. It is general when it is limited to the heirs of

the body, and special when the limitation is to a special class of such heirs, i.e., the heirs by a certain wife or to the male or female heirs of the body. In many states of this country estates tail are abolished, and fines and recoveries by which the restrictions against alienation were defeated have been abolished or have never existed in this country. An estate tail, however, may be barred by deed. All fees in tail have been either abolished or seriously modified in this country, and it is doubtful if they would be recognized in jurisdictions where the statutes are silent upon the subject.

An estate tail in personal property cannot exist, and an attempt to create such an estate carries an absolute property.

16. Estates for Life.—An estate for life, as the words indicate, is an interest whose extent is limited for the life or lives of certain persons. The term includes all estates that may last during the life of the tenant, although they may be determined at an early time. Determination is in such case uncertain, as the contingency may never happen. An estate for life in its broadest sense is every estate not of inheritance, without a fixed limit. Estates for life are divided into two classes, those created by the act of law and those created by the act of the parties. In the first class are those of dower, curtesy, and homestead. These will be described in a later section, to which the reader is referred.* In the second class, estates are either for the life of the grantee or for the life of some other person. Estates of the latter kind are known as estates *pur autre vie*.

Estates *pur autre vie* are not common in this country, but they sometimes occur where a tenant for his own life conveys his estate to third persons. He cannot convey more than he has, and his grantee therefore takes the estate during the life of the grantor. If the tenant died during the life of the grantor at common law, the balance of the estate went to the first person who took it, who was termed a general occupant. If the original gift were made to the tenant and his heirs, the heirs took the estate as special occupants. In England, if there be no special occupant, the estate went to the executors as personal property, unless it has been disposed of by will. This rule has been adopted in this country except in a few states, where the life estate descends as real estate. At common law no words of limitation were necessary to create an estate for life, but now, in those states whereby the statute passes without the words of inheritance, the intention to create an estate for life must be clearly expressed. A tenant for life may convey his interest unless restrained, and can grant his whole estate, or he may grant any number of smaller estates, all together not to exceed his own estate. He cannot convey more than his own interest unless he resorts to the old common-law feoffment, in which case he can convey a fee, but he works a forfeiture of his own estate by so doing. A tenant for life cannot gain a title by adverse possession, nor can a stranger during the tenancy for life acquire rights by adverse

* See Sec. 17, *infra*.

possession, because the remainderman has not the right to possession until the death of the tenant for life, and he then has a statutory period of twenty years (more or less) in which to bring his action to recover possession of the estate.[1]

A life estate may be created in personal property. If the articles be specified, the donee is entitled to the possession on signing an inventory and receipt to the executors acknowledging the right of the remainderman. If there be danger of waste of goods, security may be required of the tenant for life. If the bequest be of money or stocks, the executor may hold the same invested, and will pay the income to the tenant for life. If, however, the things bequeathed be such as are consumed by use, the bequest is an absolute gift.

17. Dower, Curtesy, and Homestead.—*Dower* is a certain estate of a wife in the real property of her husband. At common law it was a life estate in one-third of all the legal estates of inheritance which the husband owned at any time during the wife's marriage to him. Dower in the several States of the United States has been changed by statute, and in some States it is an estate only in name. It attaches to all hereditaments, corporeal and incorporeal, which savor of realty. They attach to franchises, as a market, a mill, a ferry, and to mines already opened, to land covered by water, to turpentine-trees boxed by husband, etc. There is no dower in shares of stock in corporations generally, nor in fruits, grass, and spontaneous productions of the soil growing at time of husband's death.[2]

Curtesy is an estate for life created by law which a husband holds in an estate of inheritance in severalty, in coparcenary, or in common, of which the wife was seized at any time during their marriage, provided the wife has had children born alive who could possibly have inherited the same estate as heir to the wife. Four requisites must exist, viz.: (1) there must have been a legal marriage; (2) the wife must have been seized of the estate during her married life; (3) there must have been issue capable of inheriting the estate; (4) the wife must be dead.

Homestead, generally speaking, is the house and land constituting a family residence, but in law it is a family residence, exempt from forced sale by statutory law. The estate to which the homestead is exempt from forced sale varies in different states, as it is a protection created by statute. It is a measure to abridge the right of creditors to take a certain interest reserved to the debtor or his family. It confers no right of property upon the debtor, for such a law would be unconstitutional.

In making conveyances care must be taken to consider dower, curtesy, and homestead interests, and to secure such a release of these life interests as shall give to the grantee a clear title or one which shall answer the purposes to which the estate is to be employed. This is done by having the wife or

[1] 6 Amer. & Eng. Ency. Law 880–882. [2] 5 Amer. & Eng. Ency. Law 890–892.

husband execute the conveyance one with the other, and to effect a release of homestead rights by a deed or by a clause inserted in the deed of conveyance.

18. An Estate for Years.—This is an interest in the land granted for a definite, fixed time on certain agreed conditions. The interest is created by a contract called a *lease*, and originally the tenant's right was merely a right of action on the contract. This was later changed into an actual estate in the land. The lease is a chattel, and passes to the personal representatives of the tenant and not to his heirs. The term "years" is merely descriptive, and the estate may be for any time, i.e., a month.

The duration of an estate must be fixed and certain, and the term may begin at any time in the future not beyond the limit laid down by the rule against perpetuities. No especial words are necessary to create an estate for years. "Demise," "grant," and "let" are the most common, but any form of words showing the intention to transfer the possession for a certain length of time is sufficient.

An estate for years may be terminated by the eviction of the tenant by the lessor, or by a release or a surrender of the premises by the lessee to the lessor. If the premises are destroyed by fire or otherwise rendered untenantable, that in itself is no reason for terminating the tenancy. The covenant to pay rent holds unless the rule has been modified by statute, as is the case in many states. A surrender of the premises to the landlord extinguishes the rent, but the abandonment by the tenant does not amount to a surrender unless the landlord assents to it. A surrender is accomplished by operation of law when the tenant takes a new lease the enjoyment of which is incompatible with the existence of a prior lease, or when the landlord's assent to the abandonment of the tenant is shown by some act inconsistent with the prior tenancy.[1]

19. Description of Premises in a Lease.—A proper description of leased premises should be inserted in a lease in order to pass all the premises intended to give effect to the instrument. If the lease does not describe the premises with a reasonable certainty, it is void. A lease of ten acres of land in a certain section was held not to designate what ten acres was intended, and it was therefore void for uncertainty.[2]*

The description of the leased premises need not specify all the particulars of the subject-matter. What is accessory to the part described will be included, as, for example, the general description of a farm will include the buildings appertaining to it.

In determining what is included under the lease, all parts of it must be considered.[3]

[1] 6 Amer. & Eng. Ency. Law 886.
[2] Patterson *v.* Hubbard, 30 Ill. 201; Dingman *v.* Kelley, 7 Ind. 717.
[3] 12 Amer. & Eng. Ency. Law 983, *and cases cited.*

* *See* Secs. 541–570, *infra.*

20. Estate at Will.—An estate at will is an estate in land which may be determined by either party at will, and it arises only on the actual possession of the tenant. It may be ended by either party showing an intention to terminate the tenancy or doing any act that is inconsistent with the relation of landlord and tenant. Under an estate at will a tenant has no interest that he can convey. In fact, what interest he has is terminated by a conveyance either by himself or his landlord; it is ended by the death of either party. When a tenancy at will is terminated by the landlord the tenant may have a reasonable time to remove his goods, crops, and stock, but the tenant is not entitled to a formal notice to leave. A demand for possession ends the tenancy.

On account of the hardships arising to the lessee under such laws, the courts, by process of judicial legislation, have refused to recognize the determination of the estate at will where the rent was reserved and paid without due notice being given by the landlord who desired to end the tenancy.

A class of estates called "estates from year to year" has been created in this way, and they continue for an uncertain number of fixed periods which may be terminated only by giving due notice. The length of these periods of time is regulated by the manner of reservation and rent. If the rent is annual, the term continues for a year; if quarterly, for a quarter, etc. This law has been generally adopted in America, except in the states of Maine and Massachusetts, where tenancies at will still exist. Leases by the month are also included in the definition from year to year, and in all cases of such estates notice for a reasonable time is required before the termination of the tenancy. The length of time for such notice is frequently fixed by the statute. If the rent is paid monthly, a month's notice is usually required, and if no notice be given, the tenancy continues for another term, and so on. The courts are likely to construe all general or doubtful tenancies as estates from year to year, and under the statutes of frauds parol leases are construed to be estates from year to year by the payment of rent or by other circumstances which indicate that such was the intention of the parties.

21. Estate at Sufferance.—This is an estate which a tenant holds where he has come lawfully into possession of the land and holds over, after his lease has terminated, without the assent of his landlord either expressed or implied. The original possession must have rested on an agreement of the parties or by permission of the landlord, or it becomes an estate at will or an estate from year to year. The payment of rent may confer a tenancy at will or from year to year. The estate is created by implication of law and by the courts to prevent an adverse possession when the original tenancy is terminated without the knowledge of the owner. The tenant cannot deny his landlord's title nor hold adversely to him. He is not liable for rents.

22. Estate in Possession—Estate in Expectancy.—In regard to the time of their enjoyment, estates are either in possession or in expectancy. An

estate in possession gives a person a right of present enjoyment, while an estate in expectancy is one which cannot be had until a future time. An estate of freehold is said to be in possession although it be subject to an existing prior chattel interest. Estates in expectancy include reversions, remainders, and future interests.

23. Estate in Reversion.—A reversion is the interest of a grantor of land who has conveyed an interest which is less than his whole interest. It is a right to land after a particular estate that has been conveyed is determined. It is a present vested interest in land although the time of possession is postponed. A grant of a fee simply conveys an absolute interest, and therefore there can be no reversion in the grantor. A reversion may be assigned or devised, or it may descend to the heirs of the grantor. There is no curtesy or dower in a reversion unless the particular estate is less than a freehold, or unless the owner of the reversion comes into possession before his death.

24. Estate in Remainder.—A remainder is a future estate, in lands of any degree, which is preceded and supported by a particular estate in possession. A remainderman must have possession immediately upon the determination of a prior estate and which is created at the same time and by the same conveyance. The remainder is distinguished from the reversion because the former is always granted to a third person and is not an estate in the grantor. The remainder of a particular estate must pass from the grantor at the same time that the particular estate is granted. The remainder must also vest in the remainderman during the existence of the particular estate or at the moment it comes to an end. There may be a succession of remainders as often as the particular estate ends, and the remainder then vests in possession and becomes in turn a particular estate to support the succeeding remainders. There can be no remainder without a particular estate to support it.

Remainders are of two kinds, vested and contingent. A vested remainder is one that is ready to take effect on the determination of a particular estate at any time or in any manner. A contingent remainder is one that is vested subject to a condition precedent. That condition may be the happening of a certain event, or it may depend upon the existence of persons who are not ascertained or in being at the time of the grant. The law favors the vesting of estates; and if a limitation may be considered either as an executory devise or a remainder, it will be held to be the latter; and if it can be construed either as a vested or a contingent remainder, the law will consider it as vested if the words creating it are capable of that construction. A vested remainder will pass to heirs, and it may be alienated or devised. It may be taken on execution; in which case it passes to the assignee in bankruptcy. A contingent remainder is uncertain; that is, the right itself to the remainder is uncertain. There are two classes of contingent remainders. One class includes all cases where the persons that are to take are, at the time of the gift, uncertain or are not in existence; the other class includes cases where

the vesting of the remainder is made to depend on the happening of some collateral event. It may be that this event is certain to occur, but it may be uncertain whether it will happen before the termination of a preceding particular estate; or it may be doubtful if the event will ever happen at all. The particular estate required to support a contingent remainder must be a freehold interest.

25. Joint Estate.—A joint estate is one in which the title is vested in two or more persons. The law recognizes four such joint estates, viz., a joint tenancy, a tenancy in common, a coparcenary, and a tenancy by entirety.

An estate in *joint tenancy* is an estate held by two or more persons jointly, with an equal right in either to share in the enjoyment of the lands during their lives. When one of the tenants dies his share goes to the survivors until only one is left, who then takes the estate to himself entirely. The land then descends to the heirs of the sole survivor. There may be a joint tenancy in any of the estates in land. The estate must possess four essential elements, viz.: (1) the tenants must have one and the same interest, i.e., all the tenants must hold either in fee or for life, etc.; (2) estates must have accrued by one and the same conveyance; (3) the tenancy must commence at one and the same time; (4) it must hold by one and the same undivided possession.[1]

A joint tenancy is created only by purchase. The main feature of a joint tenancy is that of survivorship, and the American law is opposed to estates which depend solely upon this principle. Joint tenancies cannot exist between corporations, because there can be no survivorship.[2]

An estate called a *tenancy in common* exists where two or more persons hold together the possession of land, each holding by a separate title. The tenants may hold by different titles which may have vested at different times, and the periods of holding may be different. There is no right of survivorship; but each tenant may alienate his share by will or deed, or if not disposed of, it will descend to his heirs or next of kin. Each tenant in common has a right to the entire, but not to the sole, possession of the estate. His estate is separate, and he cannot bind his cotenant by any agreement or conveyance.

An estate in *coparcenary* is a joint estate going to the heirs of one who dies without making a will. Each heir holds his share as an entire estate, and the shares may be unequal though all the heirs take the whole estate as one heir. When one heir dies his estate does not go to those who survive him; yet the estate is not to be broken up for the purpose of transmitting to the heirs of one of the deceased tenants, but it remains entire until turned into a tenancy in common by some one of the tenants selling or transferring his interest in the estate. Estates in coparcenary do not exist in America except in Maryland, and the heirs of one who has not made a will or otherwise disposed of his property take as tenants in common.

[1] 6 Amer. & Eng. Ency. Law 891.
[2] 6 Amer. & Eng. Ency. Law 892, *and cases cited.*

An *estate by entirety* is created by a conveyance to the husband and wife jointly. Each is possessed of the whole estate, and not of a share. Therefore, on the death of either of the parties the property goes to the survivor, and this right of the survivor to the whole property cannot be destroyed by either party. There are no rights of partition. During the lives of the husband and wife the husband has the control of the estate. He may receive the rents or profits and may mortgage or alienate the property. But such a conveyance is absolute only when the husband survives the wife. If the wife outlives the husband, she acquires the entire interest in the land, and may bring an action to recover it. If a conveyance be made to the husband and wife and a third person, they become joint tenants, the husband and wife taking only one-half of the land, and the other person named the other half. Tenancies by entirety do not exist in some states, and they have been abolished or modified by statute in other states.

26. Estate in Severalty.—This is an estate held by one person in his own right exclusive of any other person being joined with him in point of interest. It is opposed to joint ownership where tenants hold in undivided shares.

27. Estates on Condition—Mortgages.—An estate on condition is one that may be created, enlarged, or defeated upon the happening or failure to happen of a particular event. Such an estate is, strictly speaking, a qualification of some other estate rather than a distinct estate of itself. Conditions may be either precedent or subsequent. Conditions precedent are such as must happen or be proved before the estate can vest or be enlarged. A condition subsequent is one that defeats an estate already vested. Conditions may be expressed or implied. Further discussion of the subject of estates on condition, including that of mortgages, is beyond the scope of this work, and for fuller information upon this head the reader is referred to special treatises.

28. Partial Estates.—The author adopts this term to indicate an ownership that, though it may not rise to the dignity of an estate in the technical sense of the word, is frequently met with in industrial improvements and developments, and should always be kept in mind by those engaged in such work. It applies to the ownership of particular interests in lands, such as the minerals and metals of the soil, the liquids and gases which permeate it, and the natural vegetable products which it yields. These may be the subject of a special grant or conveyance, and may represent the chief interest of value in an estate. The interest may also be merely a right to occupy or use for certain specific purposes, as when rights of way are held for railroad, telegraph, and pipe-line systems. Where such rights or interests have been granted, they must be kept in mind whenever an estate is the subject of conveyance, as they are a cloud upon the title.

29. Incorporeal Property.—Corporeal property includes things which may always be seen and handled: physical objects, such as land, animals, and materials. Incorporeal property consists of certain rights or privileges con-

nected with or issuing out of corporeal things, as rents from houses and lands, or a right of way over land, or a privilege to hunt or fish on the estate of another, etc. The existence of incorporeal property is merely an idea or contemplation, though the effects and results, as the benefit and profits, may be objects of our bodily senses. An incorporeal hereditament is anything the subject of property which is inheritable and not tangible or visible. Incorporeal property in the United States comprises (*a*) rents, (*b*) commons, (*c*) annuities, (*d*) easements, (*e*) franchises.

Rent is a certain profit issuing periodically (annually) out of lands or corporeal tenements. It may be properly classed with incorporeal hereditaments when regarded as a fixed, permanent charge upon the land, as it was in early English history. Rent in its ordinary acceptation of the present day is a sum of money paid for the occupation of land, and in this sense is not an incorporeal hereditament though it does come strictly within the definition.

A *common* is a profit which a man has in the hands of another, such as pasturage for his stock, the right to catch fish or to cut wood, etc. They were usual in early English history, but are rarely met with in this country, except when acquired by prescription.

An *annuity* is a yearly sum stipulated to be paid to a person in fee, for life or for years, and chargeable on the person of the grantor. If payable to a person and his heirs, it is a personal fee, and forfeitable for treasure as an hereditament, and for that reason it belongs to the class of incorporeal hereditaments.

An *easement* is a privilege without profit which one landowner has in a neighbor's estate, and existing in respect to the estate, by which the servient owner is obliged to suffer or not do something on his own land, for or to the advantage of the dominant owner.* From its very nature it is an incorporeal hereditament. It is not tangible, is inheritable, and issues out of, is annexed to, and concerns corporeal things.

A *franchise* is a special privilege conferred by the government on individuals and which does not belong to citizens by common right. In the United States franchises are derived from the state, such as ferries, railroad charters, etc.† Patent rights and copyrights are also forms of government franchises, and they are incorporeal property.

* See Secs. 641–859, *infra.*

† See Secs. 861 *et seq.*, *infra.*

CHAPTER III.

TITLE TO PROPERTY. HOW ACQUIRED.

31. Acquisition of Real Property.—Real property may be acquired in three ways: (1) by original occupation, (2) by operation of law, and (3) by purchase.

One acquires land by *original occupation* when it is taken by conquest or by virtue of discovery, or when the prior owner cannot be determined, as where it is reclaimed or added to other lands by the action of a stream or body of water, as by the waters receding or by deposits due to action of the waters.*

Real property is acquired by *operation of law* when it passes by descent to the heir. The estate descends to the heir whether he will have it or not: he cannot refuse it nor reject it. In the United States the laws of descent are statutory, and they differ in the different states, though the same general principles prevail.

Land acquired by *purchase* includes all other means of acquiring property, except by original occupation and by descent. It means simply that there is some act of a person or party that takes the property. It embraces two kinds or classes, depending upon the relation of the former owner to the new owner, viz., whether the property is taken without the consent of the former owner or with his assistance. The former class includes title to property acquired by escheat, by forfeiture, by eminent domain, by estoppel, by prescription, or by adverse possession under statute of limitations. The latter class includes estates created by livery of seisin, by special custom, by public grant, by office grant, by private grant, or by devise.

32. Title Acquired without Consent of Former Owner.—When land was acquired by *escheat* it ascended to the heir at law. The heir was not required to take it; it required some effort on his part. It took place when the blood of the owner became extinct and there was no one to whom it could descend. In modern times escheat denotes the acquisition of an estate by a state, either because the tenant is an alien or because he has died intestate, without lawful heirs to take his estate by succession. Escheat, on account of

* *See* Secs. 376–390, *infra*.

alienage, is largely done away with in the United States, and the most important cause of escheat at the present time is the want of heirs.

In early common law *forfeiture* was the result of the acts of the owner or tenant against the interest of his lord. If a tenant for life sought to make a feoffment of his land, his estate was forfeited. This has been abolished. Forfeiture now occurs only on condition broken, where a lessee denies the title of the lessor by attorning to a stranger, by refusing to pay rent, or by paying rent to a stranger.

Eminent domain is that sovereign power vested in the people by which they can, for any public purpose, take possession of the property of any individual upon paying him a just compensation. The power to take private property for public uses belongs to every independent government. It is an incident to sovereignty and requires no constitutional recognition. The power of eminent domain is vested in the several states of the United States, and the power cannot be divested by the legislature. The Federal Government has also the right to condemn lands for any purposes necessary to the exercise of the powers delegated to the Federal Government by the states.*

Title inures to a person by *estoppel* when he is a grantee of a grantor who had not title to the land when he made the conveyance with covenants of warranty, but who has subsequently acquired title to the property. The doctrine also applies to personal property.

An estate may be acquired by *occupation*, as when one dies who has bought the estate for the life of another person, and he dies before his grantor. The person who first takes possession of the estate is called a general occupant, and he holds the estate by virtue of his occupation. To be an occupant a person must have actual use and possession of the land.

Prescription is where an estate or thing is claimed by a person because he, his ancestors, or predecessors have had or used it from time immemorial. Anciently it was required that the use and enjoyment should have been beyond the memory of man, but in the eighteenth century the English courts adopted a fiction which presumed a grant after twenty years' possession and use.†

Adverse possession is a possession inconsistent with the rights of the true owner and with the intention of excluding the rightful owner. The possession with regard to the owner must be hostile or adverse, actual, visible, notorious, exclusive, continuous, and under a claim or color of title. If a person hold land as the owner thereof adversely for the full period of limitations as fixed by statute and without interruption, the law gives him a defense against all others who attempt to disturb him in his possession, under the statute of limitations.‡

* *See* Secs. 864–876, *infra.* † *See* Secs. 671–688, *infra.*
‡ *See* Secs. 511–540, *infra.*

33. Title Acquired with Assistance of Former Owner.—*Livery of seisin* was a common-law ceremony of conveying land, where the grantor and grantee went upon the land alone and in a more or less ceremonious manner declared their intention to convey and to receive the possession and ownership of the land. It was often accompanied by acts on the part of the grantor such as the delivery of the title-deeds and of a minute part of the estate. Such a livery of seisin was commonly called a feoffment.

In early English history land descended or passed between persons by certain *special customs* existing in certain localities and places, but they have for the greater part been destroyed by statute laws or have become extinct. They are scarcely known in this country.

The term *public grant* denotes the mode or act of creating a title in any person, corporation, or body politic to lands which had previously belonged to the government of the state or nation making the grant. It includes the conferring of franchises.

An *office grant* is a conveyance made by an officer of the law to effect certain purposes where the owner is either unable or unwilling to execute the requisite deeds to pass the title.

A *private grant* is a grant by a private person or corporation. This is by far the most common form of conveying titles. The law in regard thereto is a system of principles of the construction of an agreement to transfer real property, and the most popular mode is that of bargain and sale by deed.*

A disposition of real estate by last will and testament is called in technical language a *devise*. At common law it was considered not so much in the nature of a testament as of a conveyance by way of an appointment of particular lands to a particular person. The person benefited is called a devisee. A testamentary disposition of personal property is called a legacy or bequest, and the person who takes it is called a legatee.

Land may also be acquired by *dedication* and by *agreement and acquiescence*. These rights are acquired by the consent of the owner; and while cases where persons have acquired title by these methods are not frequent, yet they are recognized methods of conveyancing. They are more fully treated in another part of this work.†

34. Who May Hold and Own Lands.—The capacity of a person to take, hold, or transfer real estate is determined and controlled by the local law of the place where the land or property is situated, and not by the law of the person's domicile. If a *person* has power to convey or take by the law of the place where the land lies, he will make or take a valid title notwithstanding the law of his domicile incapacitates him from making such a transfer or holding real property.

In the United States generally, any person can take and hold real property, be the person man, woman, or child, a married woman, an idiot,

* *See* Secs. 41–50, *infra*.

† *See* Secs. 491–510, 701–710, *infra*.

an inebriate, a lunatic, or an alien, the one requirement being that the person shall be living.

An *alien friend*, or one who is the subject of a country which is at peace with our country, may take an estate in lands by purchase, devise, or bequest. At common law he could not take lands by descent, but by statute in every state, so far as the author has knowledge, an alien takes land as a citizen.[1] If an alien dies without heirs, his estate goes to the state.[1] In some states it is required that the alien shall take steps to become a citizen of the state.[2] Civilized countries give to an alien enemy protection of person and property until ordered out of the country. A person who has an interest in real estate, such as a right to all the rents, profits, and even the possession of the property, held by another as a *trustee*, is not the owner or holder thereof, but merely a beneficiary. The trustee is the owner and holder of the land, though he may not be entitled to the benefits thereof.

A person may not hold property by or through agents or representatives. When under guardianship he may not convey what he does hold.

35. Partnership's Interest in Realty.—A copartnership firm, independent of the members thereof, is not a legal person, either natural or artificial, and cannot therefore take or hold real property. A conveyance in the firm name is therefore insufficient to convey the legal title; but it has been held valid as a contract to convey and to vest such an equitable title in the partnership as will defeat an after-acquired title. A conveyance to Jarrett, Moon & Company was held to vest title in the member or members of the firm in trust for the partnership, and that parol evidence was admissible to explain the uncertainty arising from the omission of the Christian names of the members. Conveyances of real property for firm purposes are usually made to the members of the firm as tenants in common.

The laws of Louisiana prohibit a commercial partnership from owning immovable property; therefore a firm is incapable of acquiring title to real property.[3] In the United States the right of survivorship in joint tenancy has generally been destroyed by statute, and therefore the legal title to the interest of a partner in the lands held by himself and his associates for the purpose of a partnership descends, upon his death, to his heirs at law, subject to the claims of his partners and the creditors of his firm. The share remaining after the discharge of all demands against the firm and the complete adjustment of its affairs goes to his heirs, subject to the partner's widow's dower, and not to his executor or administrator.[4]

In England and Canada partnership real estate is considered as personal estate for all purposes, and after the settlement of the firm affairs it is not

[1] 1 Amer. & Eng. Ency. Law 458.
[2] *See the* Laws of New York, Texas, So. Carolina. *And see* 1 Amer. & Eng. Ency. Law 458.
[3] McKee *v.* Griffin, 23 La. Ann. 417.
[4] Lindley's Law Partnership (Bl'kstone Ed. 1888) 341.

subject to dower, and is distributable as personal property. In the United States the rule is almost universal to regard it as personal property as far only as may be necessary for the payment of debts and the adjustment of firm accounts, the balance retaining all the incidents of real property. When real estate is purchased by partners with firm funds for partnership use, the legal title is held by the members of the firm, usually as tenants-in-common, subject in equity to be used in settling the liabilities of the firm. When the debts of the firm are paid, the incidents and qualities of real estate revive and the real estate becomes subject to dower and homestead rights. The wife of a partner of the firm should therefore join in the conveyance of land as a matter of precaution, if it be the intention to convey a clear title. In some jurisdictions the partnership property is held to be personalty until the partnership is wound up either by decree, judgment, or agreement, when it is determined to be no longer partnership stock nor required for firm purposes.[1]

Real property purchased with firm money inures to the benefit of the firm, and is part of its assets though the legal title is held by one or more partners of the firm. Such property is subject to an implied trust in favor of the firm, and is liable for debts to creditors. The manner in which property is treated on the books of the firm is usually cogent evidence as to its partnership character. If the value of land held by one partner be credited to him, or one-half be charged to the other partner, or the deed be made to the members of the firm, describing them as partners, or the taxes have been paid by the firm with firm funds, such facts may be held sufficient to raise an inference that the land is firm property.[2]

36. Interest of Corporation in Realty.—A corporation is a mere creature of the law (legislature), and it can hold and convey property only when the power has been conferred by statute and for the purposes for which the corporation was created. In many states the power is regulated by general statutes, and in others by the special charters granted. The power of a domestic corporation to acquire, hold, and dispose of real estate is implied from the purposes for which the corporation was created, unless such power is restricted by its charter. A corporation may be a tenant-in-common with a natural person, but it has been held that it cannot take an estate in joint tenancy if survivorship be an incident thereto. The right of religious and charitable corporations or associations to hold real estate in any territory of the United States is limited by statute to $50,000.[3] In Pennsylvania also the power of corporations to hold real estate is limited, in that they prohibit the dedication of property to superstitious uses and to corporations without statutory licenses.[4] A general right to own and dispose of land includes a power to mortgage the property. In some states the power to mortgage is restricted; it may be by charter, by general statute, or by a duty to the

[1] 17 Amer. & Eng. Ency. Law 950.
[2] 17 Amer. & Eng. Ency. Law 945-948.
[3] United States Rev. Stat. 1880.
[4] 4 Amer. & Eng. Ency. Law 233.

public, the fulfillment of which it could not perform if it made the mortgage. In New York State manufacturing corporations must have the written consent of at least two-thirds of the corporate stock, which consent must be recorded in the county where the land is situated.

The power of corporations to take property by devise is regulated by the statutes of the several states, and no general rule can be given. If a corporation be incapable of taking real estate by devise under the laws of its domicile, it cannot take such property in another state. The want of power of a corporation to take by devise must be distinguished from a lack of capacity of a testator to devise to a corporation. If a corporation be competent under the laws of the state which created it to take by devise, it may take a devise from a citizen of another state though the state incorporating the company has a statute prohibiting all devises of lands to corporations. In some states there are statutes which deny or limit the power of foreign corporations to acquire real estate, and under such statutes a foreign corporation cannot take title. A conveyance to a foreign corporation, however, is usually held not void, but voidable, only when attacked by the state itself. If there be no local law established by statute or by decisions which forbids a foreign corporation from acquiring or holding real estate in the state, and the company is not forbidden by the law of its existence, it may exercise in any state the general powers conferred by its own charter.

CHAPTER IV.

CONVEYANCES OF LAND. ESSENTIAL ELEMENTS OF DEEDS.

41. Necessary Elements of a Deed.—A deed to convey an interest in land must have the following elements: (1) there must be two parties, a grantor and a grantee; (2) there must be a consideration; (3) there must be a subject-matter capable of being conveyed; (4) the deed must be executed in writing, signed, sealed, attested, acknowledged, and delivered.

42. Proper Parties—*The Grantor.*—The grantor must own the same interest as is conveyed by the deed, and have the capacity to convey it. All persons owning the subject-matter of the conveyance have the power to convey such interest, except those under a legal disability, such as infants, married women, and those of unsound mind.

The deed of an infant is held to be voidable at the election of the infant, and not absolutely void.[1] The infant may, at his option, either repudiate the deed or ratify it after attaining legal age. The deed of a person of unsound mind is held to be void if the state of his mind is such that he cannot comprehend the character of the transaction. Any impairment of the mental faculties short of complete disability to understand the character and nature of the transaction, is held to make the deed voidable and not absolutely void.[2] The deed of an habitual drunkard is not invalid unless his mind is so impaired by the use of liquor that he cannot understand the nature of the act.[3]

At early common law the deed of a married woman was absolutely invalid, as a married woman had no power to grant by deed. This, however, has been generally changed by statutes in nearly all the states, so that now a married woman has full power to make a valid deed. In some states the deeds of married women must be executed in a peculiar manner, and unless the statute is strictly complied with the deed is void.

The Grantee.—All persons, including corporations and those under a legal disability, may take as grantee by deed. In most of the states there

[1] Irvine *v.* Irvine, 9 Wall. (U. S.) 626; Hovey *v.* Hobson, 53 Me. 451; Howe *v.* Howe, 99 Mass. 98.

[2] Dennett *v.* Dennett, 44 N. H. 538; Doe *v.* Prettyman, 1 Houst. (Del.) 339; Burgess *v.* Pollock, 53 Iowa 273.

[3] Gardner *v.* Gardner, 22 Wend. (N. Y.) 526; Eaton *v.* Perry, 29 Mo. 96; Donelson *v.* Posey, 13 Ala. 752.

are statutes limiting the amount of land a corporation may hold. At early common law aliens could not take by deed, but this has been changed in all but a few states, so that now an alien may be the grantee of a deed.

Parties Named in the Deed.—The parties named in the deed must be so described as to be easily identified. The usual method is to give the names of the grantor and grantee in full.*

In some states a conveyance in fee simple must be made to the grantee, "his heirs and assigns forever." If these words are not used the deed is invalid. In other states this has been changed by statute.

In a deed to a corporation the word "successors" must be used in connection with the name of the corporation.

To make a clear title it is important that the wife or husband of the grantor execute the conveyance as grantor to avoid dower and curtesy interests.†

43. Subject-matter, or Thing to be Conveyed.—The grantor must have some interest in the land that may be conveyed. The conveyance of any freehold interest in land requires an instrument under seal, that is, a deed. All incorporeal interests, such as easements, rights of way, rights of common, water rights, mineral deposits, etc., also must be conveyed by deed.

The interest conveyed must be so sufficiently described as to be easily identified.

44. The Consideration.—The consideration need not actually pass to the grantor if the receipt of the consideration is acknowledged in the deed, but it must either be acknowledged in the deed, or it must be proved by other evidence, that it actually passed to the grantor. Parol evidence is inadmissible to contradict the acknowledgment of the consideration to invalidate the deed between the grantor and grantee, but the acknowledgment in the deed is only *prima facie* evidence of the amount and kind of the consideration. In an action to recover the consideration, parol evidence is admissible to show that a different amount and kind of consideration had been agreed upon.[1]

45. Execution.—A deed may be executed by the grantor himself or by an agent duly authorized for that purpose. The agent, however, must have a power of attorney under seal.[2] In some of the states it is a settled rule that a woman cannot give a valid power of attorney authorizing the conveyance of an interest in land.[3] In other states, however, a married woman may give a valid power of attorney.[4] It is generally held that the power of

[1] Pierce *v.* Brew, 43 Vt. 295; Miller *v.* Goodwin, 8 Gray (Mass.) 542; Murdock *v.* Gilchrist, 52 N. Y. 246; Irvine *v.* McKeon, 23 Cal. 475.

[2] Hanford *v.* McNair, 9 Wend. (N. Y.) 54; Stetson *v.* Patton, 2 Me. 358.

[3] Allen *v.* Hooper, 50 Me. 373; Holladay *v.* Daily, 19 Wall. 609; Sumner *v.* Conant, 10 Vt. 9; Earle *v.* Earle, 1 Spen. 347.

[4] Roarty *v.* Mitchell, 7 Gray 243; Gridley *v.* Wynant, 23 How. 503; Weisbrod *v.* Chicago, etc., R. Co., 18 Wis. 41.

* *See* Secs. 31–36, *supra.*

† *See* Sec. 17, *supra.*

attorney of an unmarried woman to grant by deed is revoked by a subsequent marriage.[1]

A deed must be in writing to satisfy the statute of frauds, which requires all grants of all interest in land to be in writing. It must also be in writing in order that it may be proved, as parol proof is not admissible to establish a grant of an interest in land. Nearly all the states have registration laws for the recording of deeds. In order that a deed may be recorded it is necessary that the deed be in writing.

The generally accepted rule is that a deed must be written on either paper or parchment, as these materials are considered more durable than others, and alterations and erasures cannot be so easily made by those intending to commit a fraud.

Signing.—In most if not all of the states the signature of the grantor is necessary to the validity of the deed. The statute of frauds requires every instrument of conveyance coming within its operation to be signed. If the statute requires the instrument to be subscribed, it must be signed at the end. Otherwise the signature may appear anywhere in the instrument.

The effect of a deed cannot be destroyed by the grantor's erasure of his signature after the grantee's death. The deed takes effect immediately upon delivery to the grantee.[2]

Sealing.—In all but a few of the states a seal is necessary to the validity of a deed. In Louisiana, Kentucky, Iowa, Alabama, Kansas, and Texas seals have been abolished by statute.

At common law the seal had to be an impression on wax or some other tenacious substance. In some states this is still required, but generally a wafer seal is used. In a few states placing the letters "L.S." in a scroll is sufficient.

The seal of a corporation should be attached by the officer having charge of the seal.

Attestation.—Generally in the United States a deed must be executed in the presence of two or more witnesses.[3] The grantor may subsequently acknowledge the execution of the deed before two or more witnesses, when they may unite their names in attestation of the execution.

Acknowledgment.—As a general rule it is not necessary to the validity of a deed that it have a certificate of acknowledgment attached to it.[4] But in most of the states, in order that the deed may be recorded, it is necessary that the deed be acknowledged before an officer duly authorized for that purpose,

[1] 3 Washb. Real Prop. 259; Judson *v.* Sierra, 22 Tex. 365.

[2] Turner *v.* Warren (Pa. Sup.), 28 Atl. Rep. 781.

[3] Clark *v.* Graham, 6 Wheat. 577; Merwin *v.* Camp, 3 Conn. 35; Patterson *v.* Pease, 5 Ohio 119; Chandler *v.* Kent 8 Minn. 525; Day *v.* Adams, 42 Vt. 520.

[4] Gibbs *v.* Senft, 12 Cush. 393; Blane *v.* Stewart, 2 Iowa 383; Stevens *v.* Hampton, 46 Mo. 408.

and the deed must contain a certificate to that effect.[1] The officer who takes the acknowledgment must not be interested in the conveyance.

It has been held that the grantor must be known personally to the officer taking the acknowledgment of the deed, and that a simple introduction of the grantor to such officer taking the acknowledgment is not sufficient.

In some states it is required by statute that a married woman acknowledging a deed must be examined by the officer taking the acknowledgment, apart from her husband, as to whether she knows the contents of the deed, whether it is her voluntary act and without any duress. The statute must be followed exactly.

Delivery and Acceptance.—In order that a deed may be valid it must be delivered and accepted. The delivery must be unconditional, except in the case of an escrow. The grantor cannot retain any control whatever over the deed. When the delivery is made, the title passes from the grantor to the grantee. The deed must be complete before delivery, and the delivery must be made during the lifetime of the grantor. The deed must be accepted by the grantee in order that the title may pass to the grantee.

An escrow is a deed delivered to a third person to be delivered to the grantee on the happening of some event or condition. The grantor must give up all control over the deed, or, in other words, there must be a complete delivery to the third person. Unless the event takes place or the condition happens, the deed is void. The title does not pass to the grantee until the second delivery by the third person to the grantee on the happening of the condition.

46. Operative Words of Conveyance.—It is necessary that an effective deed of conveyance contain what are termed operative words of conveyance, i.e., words which indicate the intention of the grantor to transfer his estate or interest in the land in whole or in part. The deed generally used in the United States contains the words "give, grant, bargain, and sell." It is not absolutely necessary that these technical operative words be used, but it is advisable to do so in order to remove any doubt as to the validity of the conveyance. Any words will be sufficient to convey the title in fee if they clearly manifest the intention of the grantor to convey the estate.[2] In like manner it would not be fatal to the deed if the operative words are in the past instead of the present tense; for example, "has given and granted" for "do give and grant"; but it is the prevailing custom in most of the United States to use both tenses, viz., "have given and granted, and do hereby give and grant." The past tense, however, is considered merely as surplusage.[3]

[1] 3 Washb. Real Prop. 314; Clark *v.* Troy, 20 Cal. 219; White *v.* Denman, 1 Ohio St. 110; Chamberlin *v.* Spargus, 22 Hun 437.

[2] Marden *v.* Chase, 32 Me. 229; Lynch *v.* Livingston, 8 Barb. 463; Ivory *v.* Burns, 56 Pa. St. 300; McKinney *v.* Settles, 31 Mo. 541; Folk *v.* Varn, 9 Rich. Eq. 303.

[3] Pierson *v.* Armstrong, 1 Iowa 292.

47. Alterations.—An alteration or erasure made after the delivery of the deed makes the deed invalid. Some authorities hold that it is a presumption of law that the alteration was made after delivery.[1] Other authorities hold that there is no presumption of law in respect to this matter, and that the burden of proof to show when the alteration was made is on the person relying on the deed.[2]

The safer plan is to note the alteration or erasure on the deed to show that it was made before delivery, and have the notary initial the correction in the margin at the place where the correction was made.

48. Fraud and Duress.—The deed must be the voluntary act of the grantor. If, therefore, he has been induced by fraud or compelled by threats to make the deed, he may avoid it by restoring the consideration within a reasonable time. The courts differ as to the amount of duress necessary to enable the grantor to avoid the deed.[3] The rule laid down by the Supreme Court of the United States is as follows: "Unlawful duress is a good defense if it includes such a degree of restraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness."[4]

Delay in avoiding the deed may affect the rights of the grantor because of the possible intervening rights of third parties.[5]

[1] United States *v.* Linn, 1 How. (U. S.) 104; Hill *v.* Barnes, 11 N. H. 395; Galland *v.* Jackman, 26 Cal. 85; Paine *v.* Edsell, 19 Pa. St. 180; White *v.* Hass, 32 Ala. 432.

[2] Ely *v.* Ely, 6 Gray (Mass.) 439; Beaman *v.* Russell, 20 Vt. 205; Jackson *v.* Osborn, 2 Wend. (N. Y.) 555; Comstock *v.* Smith, 26 Mich. 306.

[3] Evans *v.* Gale, 18 N. H. 401; Baker *v.* Morton, 12 Wall. (U. S.) 150; Watkins *v.* Baird, 6 Mass. 506; Miller *v.* Miller, 68 Pa. St. 486.

[4] United States *v.* Huckabee, 16 Wall. (U. S.) 423.

[5] Doolittle *v.* McCullogh, 7 Ohio St. 299; Murphy *v.* Paynter, 1 Dill. 333; Lyon *v.* Waldo, 36 Mich. 345.

PART II.

RIGHTS AND PRIVILEGES INCIDENT TO OWNERSHIP OF REAL PROPERTY. PROTECTION OF, AND INTERFERENCE WITH, RIGHTS IN FLUIDS. THE SUPPLY AND USE OF WATER, OIL, GAS, AND ELECTRICITY. RIGHTS IN NAVIGABLE WATERS. INTERFERENCE WITH PROPERTY RIGHTS BY SURVEYORS. TRESPASS.

CHAPTER V.

WATER. RIPARIAN OWNERS. APPROPRIATION OF WATER.

51. Riparian Owners.—A riparian owner is one who owns land which touches a stream of flowing water. His rights are incident to the ownership of the banks of the watercourse, and it is necessary to the existence of a riparian right that the land should be in contact with the flow of the stream.[1] A canal company owning a strip of land along the banks of a stream and which touches the flow of the stream is a riparian owner.[2] Lateral contact has been held as good as vertical contact so far as concerns the rights of the riparian owner.[3]

An owner of land in the neighborhood of a stream but not upon the line of it has not the rights of a riparian owner in that stream.[4] He cannot maintain an action for damages for the obstruction of a viaduct unless he has sustained some special damage distinct from the public at large.[5]

[1] Jones *v.* Johnston, 18 How. (U. S.) 150; Johnston *v.* Jones, 1 Black (U. S.) 209; Lake Sup. Ld. Co. *v.* Emerson, 38 Minn. 406.

[2] Minneapolis W. Co. *v.* Amer. S. Co, 53 Fed. Rep. 970.

[3] Ind. Water Co. *v.* Amer. S. Co., 53 Fed. Rep. 974; Lyon *v.* Fishmongers Co., L. R. 1 App. Cas. 682.

[4] Schlag *v.* Jones, 131 Pa. St. 62; Union Mill. & Min. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73; Gould *v.* Stafford, 77 Cal. 66.

[5] Potter *v.* Ind., etc., Ry. Co. (Mich.), 54 N. W. Rep. 956.

52. Rights and Liabilities of Persons Holding under Riparian Owners.—A riparian owner need not own the fee of the land. It is sufficient if he be entitled to the exclusive possession of the land abutting on the stream.[1] It is not required that a lower riparian owner be in possession of his lands in order to maintain trespass against an upper owner to recover damages for diverting the water of the stream.[2]

It seems that a riparian owner is not responsible for the diversion of waters by his tenants.[3] A contractor is not liable for acts undertaken for a riparian landowner or a city where such acts obstructed and diverted a stream.[4] A licensee *. of plaintiff may not be held in damages for wrongfully erecting and maintaining dams across a river, as it violates the defendant's rights under his license.[5]

A grantee railroad company is not liable for injuries due to structures (jetties) erected by its grantor, not upon its right of way, to protect its bridge, the grantee company not having assumed the control or tried to maintain the said structures.[6] A grantee of an abutting owner on a street is not liable for injuries due to the cover of a water-box having become displaced, when the box had been erected in the street by his grantor and he had, on taking possession of the lot, discontinued the use of the box and constructed another in another place. The grantee of a creator of a common nuisance is liable in damages for special injury only after request to abate the nuisance.[7]

53. Riparian Rights Belong Only to Persons Entitled to Possession.—A person who is merely in possession of unsurveyed government land has no riparian rights to the use of the stream flowing through it.[8] A mere squatter is limited to his actual possession, and has no riparian rights.[9]

As proprietor of the land through which a stream flows, the government has the same property and right in the stream that any other proprietor would have.[10] The grant of a right of way along the banks of a stream will not make the grantee a riparian owner.[11] The laying out of a street in front of uplands does not deprive the owner of his riparian rights;[12] but the dedication of a strip of land along the banks of a watercourse for a street or public highway has been held to confer upon the public equal rights with the owner of

[1] Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104. A tenant may recover for injury to his crops by overflow of lands. Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251.

[2] Hogg *v.* Connellsville W. Co. (Pa.), 31 Atl. Rep. 1010.

[3] Gould *v.* Stafford (Cal.), 35 Pac. Rep. 429.

[4] De Baker *v.* So. Cal. Ry. Co. (Cal.), 39 Pac. Rep. 610.

[5] Peav *v.* Salt Lake City (Utah), 40 Pac. Rep. 206.

[6] Fordyce *v.* Russell (Ark.), 27 S. W. Rep. 82.

[7] Staples *v.* Dickson, 88 Me. 362.

[8] Lake *v.* Tolls, 8 Nev. 285; Covington *v.* Becker, 5 Nev. 281.

[9] Watkins *v.* Holman, 16 Pet. (U. S.) 25.

[10] Union M. & M. Co. *v.* Ferris, 2 Saw. 176.

[11] Indianapolis W. Co. *v.* Amer. S. Co., 53 Fed. Rep. 974; Hagan *v.* Campbell (Ala.), 8 Port 9; Potter *v.* Ind., etc., R. Co., 95 Mich. 389.

[12] Prior *v.* Comstock, 17 R. I. 1.

* *See* Secs. 661–671, *infra*.

the soil.[1] A street bordering on a stream was held to be intended for use of the public to get to the river, in contradiction to the exclusive use of one claiming riparian rights as the owner of the soil.[2]

54. Rights of the Public and of Riparian Owners to Waters.—The state has no power to arbitrarily destroy the rights of a riparian owner without his consent, and without compensation and due process of law, for the sole purpose of benefiting some other riparian owner, or for any other merely private purpose; and a law relinquishing to a person all its right, title, and interest in and to all lands lying within the limits of a lake, and authorizing the drainage of such lake without the consent of riparian owners, is void.[3] A mill-owner's right to the waters of a stream cannot be defeated on the ground that the head waters should be diverted for the consequent improvement of public highways and marsh lands.[4]

Under the colonial ordinance of 1641–47, all great ponds (ponds containing more than 10 acres) in Maine are owned by the state; and the legislature may permit towns and cities to take water therefrom for the domestic use of their inhabitants without paying damages to those who have been using the water for mill power.[5] The state of Maine has the constitutional power to grant superior or even exclusive privileges in the use of its public rivers either to persons or corporations.[6]

The fact that a water company was chartered for the purpose of supplying a certain city and its inhabitants with water and has entered into a contract to fulfill that purpose does not give the water company any additional rights to use or appropriate the waters of a stream.[7] The fact that a dam is authorized by the legislature does not relieve a city from liability for the permanent submersion of land by the construction of the dam for the purposes of a water-supply.[8] The acts of incorporation of water companies, or the general laws governing them, usually give powers of condemnation, by which they may take water rights and privileges by making just compensation.[9]

A city that has diverted the waters of a stream for public use without process of law, and not long enough to acquire a prescriptive right, may be restrained and compelled to pay damages by a recent purchaser of land, further down the stream, though he bought with knowledge of the diversion.[10]

[1] 28 Amer. & Eng. Ency. Law 948, *and cases cited.*

[2] Barney *v.* Keokuk, 94 U. S. 324. *But see* Potomac Steamboat Co. *v.* Upper P. S. Co., 109 U. S. 672, where the fee of the street was in the United States.

[3] Priewe *v.* Wis. St. L. & Imp. Co. (Wis.), 67 N. W. Rep. 918.

[4] Stock *v.* Jefferson Tp. (Mich.), 72 N. W. Rep. 132 [1897].

[5] City of Auburn *v.* Union Water-Power Co. (Me.), 38 Atl. Rep. 561 [1897].

[6] Mullen *v.* Penobscot Log-Driving Co. (Me.), 38 Atl. Rep. 557 [1897].

[7] Tampa W. Co. *v.* Cline (Fla.), 20 So. Rep. 780; Saunders *v.* Bluefield W. & I. Co. (C. C.), 58 Fed. Rep. 133.

[8] Baltimore *v.* Merryman, 39 Atl. Rep. 98; Carl *v.* W. Aberdeen Co. (Wash.), 43 Pac. Rep. 890.

[9] Laws of New York 1873, chap. 737; 1876, chap. 415.

[10] Duesler *v.* Johnstown, 48 N.Y. Supp. 683.

A water company cannot resist a riparian owner's application for an injunction compelling it to restore the natural flow of a stream, by an answer that he has enough water left for all his uses and purposes, or would have enough if he properly controlled or secured it.[1]

55. Riparian Rights Incident to Ownership of Land.—The rights of riparian owners in streams are rights which are incident and belong to the land through which the water flows. They do not exist by reason of a presumed grant or long acquiescence. They exist from the moment that the land is acquired, whether they have been exercised before or not. They cannot therefore be lost by long user, though they may be lost by the adverse enjoyment by another, which destroys the right.[2] The right to the natural flow of water of a stream is a right guaranteed by law. A riparian owner cannot be divested of this right except by voluntary relinquishment on his part, or by condemnation for public purposes.[3]

A purchaser of riparian land takes his full rights in the waters of a stream without special words conveying the same. If the grantor or vendor will reserve any rights to himself, he must do so in express words in the conveyance.[4] The right to have a stream-flow unobstructed is a corporeal right, it is a natural right, an incident of the property in land.[5] Each owner may insist that a stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level.[4] A lease of the surplus water of a canal, not required for the purposes of navigation, does not convey any right to the *corpus* of the water, and when the canal is abandoned the water may be altogether withdrawn.[6]

56. Rights in Streams are Common and Not Divisible.—The rights of a riparian owner to the use of the waters of a stream are not exclusive nor absolute, but are subject to the rights of other riparian owners along the stream, except when expressly qualified by grant or prescription, or by the right of the prior appropriation, such as is recognized in some of the western states, where irrigation is practiced. There is a popular sentiment among the people that water is public property and free as the air we breathe, but this contention cannot be supported unless the stream be a navigable stream, in which the public have special rights. The property of water in running streams is indivisible, and all the proprietors of the land bordering on the stream are entitled to an equality of rights therein. The stream must be

[1] Gilzinger *v.* Saugerties W. Co. (Sup.), 21 N. Y. Supp. 121. *And see* Low *v.* Schaffer (Oreg.), 33 Pac. Rep. 678. *But see* Pine *v.* New York (C. C.), 76 Fed. Rep. 418, *and* New York R. Co. *v.* Rothery (N. Y.), 14 N. E. Rep. 269 [1888].

[2] Clinton G. Lt. Co. *v.* Fuller (Mass.), 48 N. E. Rep. 1024; Duesler *v.* Johnstown, 48 N. Y. Supp. 683 [1898]; Eddy *v.* Chace, 140 Mass. 471; 28 Amer. & Eng. Ency. Law 949.

[3] Gilzinger *v.* Saugerties W. Co. (Sup.), 21 N. Y. Supp. 121; Union Mill. & Min. Co. *v.* Dangberg (C. C. D. Nev.), 81 Fed. Rep. 73.

[4] Gould on Waters, §§ 204, 208.

[5] Scrivner *v.* Smith, 100 N. Y. 471.

[6] Hoagland *v.* N. Y., Chicago & St. L. Ry. Co. (Ind.), 13 N. E. Rep. 572 [1887].

used as an entire stream in its natural channel. There can be no dividing it into parts without mutual consent.[1]

57. Appropriation of Waters by Riparian Owners—Extent of Use.—There is a general rule that no riparian owner has a right to use the water to the prejudice of another. He may make use of his right to a reasonable extent. He may use what is reasonable for domestic and agricultural purposes, and the reasonableness of the use is a question of fact for a jury to be determined by the particular circumstances of each case, having regard for the diminution in quantity, the retardation or acceleration of the current, and any extraordinary uses,[2] considering the width and depth of the stream, the fall, the volume of water, and the state of improvements in manufactures and useful arts.[3]

It is reasonable to make use of the force of a stream, and to make limited and temporary appropriation of its waters; but the rights of a riparian owner are such as his location and opportunity afford him, and are prior to other owners below him and subsequent to those above him on the stream.[4] So much as will not materially and sensibly diminish the quantity may be diverted for manufacturing purposes,[5] and more water may be taken at times of high water and flood.[6] At such times a water company which is a riparian owner may store and pump the surplus or flood waters, provided such diversion and appropriation cause no actual injury to riparian owners nor impair the rights of another water company.[7]

"Natural flow" means the quantity of water ordinarily flowing in the stream at times when its volume is not increased by unusual freshets or rains.[8]

58. Regard Must be Paid to Use of Waters by Other Riparian Owners.—The use must be reasonable, conformable to the usages and wants of the community, with proper regard for the progress of improvement in hydraulic works, not inconsistent with a like reasonable use by the other proprietors of land on the same stream, both above and below.[9] One riparian mill-owner may not alternately use his water-power in connection with steam-power to the annoyance and injury of a lower mill-owner, as by so operating it that when he was using the steam-power he would allow the water to accumulate in his dam during working days, so that the flow was cut off from plaintiff's mill, and then during the night-time and on Sundays, when plaintiffs could

[1] 28 Amer. & Eng. Ency. Law 950; Vandenberg *v.* Van Bergen, 13 Johns. (N. Y.) 212.

[2] 9 Amer. & Eng. Ency. Law 854; 28 Amer. & Eng. Ency. Law 951, *cases cited*; Gillis *v.* Chase (N. H.), 31 Atl. Rep. 18; Quigley *v.* Birdseye (Mont.), 28 Pac. Rep. 741.

[3] Gould on Waters, §§ 204, 208.

[4] Merrifield *v.* Worcester, 110 Mass. 219

[5] Phila. & R. R. Co. *v.* Pottsville W. Co. (Com. Pl.), 18 Pa. Co. Ct. Rep. 501; Myers *v.* Phila. J. & C. Pass. Ry. Co. (Com. Pl.), 12 Montg. Co. Law Repr. 46.

[6] Heilbron *v.* 76 Ld. & Water Co. (Cal.), 30 Pac. Rep. 802; Lehigh C. & N. Co. *v.* Scranton G. &. W. Co. (Com. Pl.), 6 Pa. Dist. Rep. 291.

[7] Lehigh C. & N. Co. *v.* Scranton G. & W. Co. (Com. Pl.), 6 Pa. Dist. Rep. 291.

[8] Nemasket Mills *v.* Taunton (Mass.), 44 N. E. Rep. 609.

[9] Cary *v.* Daniels (Mass.), 8 Met. 466; Lewis *v.* Springfield W. Co. (Pa. Sup.), 35 Atl. Rep. 186.

not use the water, allowing it to run off. An injunction may be obtained perpetually restraining defendant from retaining the water except for the proper use of his mill, or from discharging it except for the purpose of running his mill, or so as to relieve his dam, and from holding back the water in order to accommodate his steam-power.[1]

It is not a question of what is a reasonable use for business or other purposes, but what is reasonable with respect to the rights of others. Every condition which affects those rights must be considered, such as the character and size of the stream, the quality of the water, and the uses to which it can be applied.[2] The appropriation of the water of an unnavigable stream by a riparian owner in such quantities as to unreasonably diminish the supply of other riparian owners is a private nuisance, for which an injunction will lie.[3]

When the needs of a riparian proprietor are satisfied, he cannot take the excess flow of the stream.[4] Therefore, when a decree in partition adjudged that certain parties should have the use of the waters of a stream the source of which is on the land of another party, the fact that, after the decree was made, the volume of water at the source of the stream increased does not entitle the owner of the land to appropriate the increase, there being no evidence of its cause.[5]

59. Reasonable Use of Waters—How Determined.—To determine the reasonable use of water by a mill-owner, it has been held necessary to consider the nature, necessity, and extent of the use, the manner in which the water is applied, previous usage, the nature and condition of the improvements upon the stream, the volume and velocity of the water, his prescriptive rights and their nature, the situation of lower mills and ponds, and the capacity of the latter, and the practicability of enlarging them.[6] The quantity of water used is limited by, and must not exceed, what is reasonably required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream.[7] The general usage of the country in similar cases may be considered by the jury in deciding what is a reasonable use.[8] The question cannot be determined by the requirements of the defendant's business or the use which was previously made of the stream, as in the case of a purchase of a mill privilege from an owner of a lower privilege.[9]

60. Water for Domestic Purposes.—A riparian owner may appropriate

[1] Hoyt *v.* Cline (N. Y. App.), 31 N. E. Rep. 623; Lewis *v.* Springfield W. Co. (Pa. Sup.), 35 Atl. Rep. 187.

[2] Hayes *v.* Waldron, 44 N. H. 580. *And see* Pine *v.* New York (C. C.), 76 Fed. Rep. 418.

[3] Saunders *v.* Bluefield W. & Imp. Co. (C. C.), 58 Fed. Rep. 133; Carpenter *v.* Gold (Va.), 14 S. E. Rep. 329.

[4] Low *v.* Schaffer (Oreg.), 33 Pac. Rep. 678.

[5] Glassell *v.* Verdugo (Cal.), 41 Pac. Rep. 403.

[6] Timm *v.* Bear, 29 Wis. 254; Dumont *v.* Kellogg, 29 Mich. 420; Stamford *v.* Felt (Cal.), 16 Pac. Rep. 900 [1888].

[7] Springfield *v.* Harris (Mass.), 4 Allen 496; Thurber *v.* Martin (Mass.), 2 Gray 394.

[8] Dumont *v.* Kellogg, 29 Mich. 420.

[9] Gould on Waters, § 208.

and consume so much of the water flowing through his land as is necessary to satisfy his natural wants, even though it consume all the water of the stream. General domestic wants include such as are necessary to his household uses and for watering stock.[1] Natural wants (or *ordinary* use) have been defined as those absolutely necessary to be supplied to maintain a man's existence; artificial wants, as those which conduce to his comfort and prosperity. Among his natural wants are the uses of water to quench thirst, keep clean, water stock, as these wants must be supplied or both man and beast will perish. The supply of artificial wants (or *extraordinary* use) properly includes those that are not indispensable, such as water-powers, steam-plants, and irrigation in a fertile country. Manufactories promote the prosperity and comforts of man, but are not absolutely essential to his existence.[2] The appropriation of waters required for domestic purposes has always been held a reasonable use.[3]

The reasonable use does not permit the riparian owner to dam up a stream and spread the water over a large surface, causing much of it to be lost by absorption and evaporation.[4] The grinding, washing, and cooling of rubber have been held not purposes for which the inhabitants had the right to appropriate and use the waters of a stream.[5] It has been held that the appropriation of water for watering a garden is a domestic use,[6] but not when there is scarcely sufficient for the natural wants of other riparian owners, for domestic use and for stock.[7]

The right of a riparian owner to the use of water in a stream, it should be remembered, is not an absolute right to a given quantity, but a right to a reasonable use. He may not take an equivalent amount for another and a different purpose.[8] A stream rising on one's land, it has been held, could not be diverted from its natural channel, though the supply of water was barely sufficient for the owner's domestic purposes.[9]

61. Appropriation of Waters by Non-riparian Owners or for Non-riparian Purposes.—A person who is not a riparian owner cannot for any purposes take or divert waters of a non-navigable watercourse, if such taking shall injure lower riparian owners;[10] as for irrigation,[11] not until after other

[1] Gould on Waters, § 205; 28 Amer. & Eng. Ency. Law 953.

[2] Evans *v.* Merriweather, 4 Ill. 495; City of Auburn *v.* Union W. P. Co. (Me.), 38 Atl. Rep. 561; Gould on Waters, § 205.

[3] City of Auburn *v.* Union W. P. Co. (Me.), 38 Atl. Rep. 561 [1897]; Philadelphia & R. R. Co. *v.* Pottsville W. Co., 182 Pa. St. 418.

[4] Ferrea *v.* Knipe, 28 Cal. 344.

[5] Para Rubber Shoe Co. *v.* Boston, 139 Mass. 155.

[6] Wilts Canal Co. *v.* Swindon Water Co., L. R. 9 Ch. 455.

[7] Mastenbrook *v.* Alger (Mich.), 68 N. W. Rep. 213.

[8] Atty.-Gen'l *v.* Gt. Eastern R. Co., 23 L. T. 344. *But see* Marshall *v.* Hershey (Pa.), 39 Atl. Rep. 887 [1898].

[9] Arnold *v.* Foot (N. Y.), 12 Wend. 330. *But see* Evans *v.* Merriweather, 4 Ill. 495.

[10] Hayden *v.* Long, 8 Ore. 244; Devonshire *v.* Eglin (Eng.), 14 Beav. 530; Gould *v.* Eaton (Cal.), 49 Pac. Rep. 577; Gould on Waters, § 224.

[11] Union M. & M. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73; Vernon Ir. Co. *v.* Los Angeles (Cal.), 39 Pac. Rep. 762.

owners have been supplied with what is required for their domestic purposes, in California, where special irrigation laws prevail.[1] It has been held, however, that the taking of waters from a river by a non-riparian owner, and the returning of it to the river unpolluted and undiminished after it has been used to cool certain apparatus, was not a ground for an injunction against the taking of the water, or against the riparian owner through whose lands it was taken.[2]

If two neighboring riparian owners divert a part of a stream, for their mutual use and benefit, into a new channel, as a raceway, they may be held to have riparian rights in the raceway as part of the stream, same as in a natural stream, and may therefore prevent an upper riparian owner from diverting more than his share of the waters.[3]

A non-riparian owner has been held to have such a right to running water as will enable him to prevent an upper proprietor from interfering with such right by using or granting the water for purposes which were not riparian.[4]

The owner of a mill site on a stream fed by lakes and surrounding marsh may enjoin a township, not a riparian owner, from diverting the head waters by cutting a ditch along the highway, even though his resulting loss would be small in comparison with benefits accruing to the public and owners of lowlands.[5]

62. Appropriation of Waters for Municipal Water-supply.—A company may not collect the waters of a stream into a reservoir to supply the inhabitants of a distant town.[6] This is true even though the city owns land on the stream and its inhabitants have from time immemorial used the water for domestic purposes.[7] It may take water and sell it, if it be within its right to a reasonable use.[8]

A water company authorized by its charter to take certain land and a stream flowing through it is entitled to all the rights of a riparian owner.[9]

As against lower owners a riparian owner cannot sell the waters of the stream,[10] as to a railroad company for use of its locomotives.[11] A water-works

[1] Smith *v.* Corbit (Cal.), 48 Pac. Rep. 725.

[2] Kensit *v.* Grand E. R. Co. (Eng.), 27 Ch. Div. 122; Ormorod *v.* Todmorden Mill Co. (Eng.), 11 Q. B. Div. 155. *See* Bristol Hydraulic Co. *v.* Boyer, 67 Ind. 236.

[3] Nuttal *v.* Bracewell, L. R. 2 Ex. 1.

[4] Heilbron *v.* Fowler Canal Co., 75 Cal. 426; Williams *v.* Wadsworth, 51 Conn. 277.

[5] Stock *v.* Jefferson Tp. (Mich.), 72 N. W. Rep. 132 [1897].

[6] Swindon W. Co. *v.* Wilts, etc., Co., 7 H. L. Cas. 697; Higgins *v.* Flemington W. Co., 36 N. J. Eq. 538; Standen *v.* New Rochelle W. Co. (Sup.), 36 N. Y. Supp. 92; Smith *v.* Brooklyn (Sup.), 46 N. Y. Supp. 141. *See* Haupts App., 120 Pa. St. 211, *and* Broadmoor Dairy *v.* Brookside Co. (Colo.), 52 Pac. Rep. 792 [1897].

[7] Ætna Mills *v.* Waltham, 126 Mass. 422; Waller *v.* Manchester (Eng.), 6 H. & N. 667; Standen *v.* New Rochelle W. Co. (Sup.), 36 N. Y. Supp. 92.

[8] Gillis *v.* Chase (N. H.), 31 Atl. Rep. 18; Lehigh C. & N. Co. *v.* Scranton G. & W. Co., 6 Pa. Dist. Rep. 291.

[9] Wright *v.* Woodcock, 86 Me. 113.

[10] Higgins *v.* Flemington W. Co., 36 N. J. Eq. 538; Swindon W. Co. *v.* Wilts, etc., Co. (Eng.), L. R. 7 H. L. Cas. 697; Heilbron *v.* Fowler S. Canal Co., 75 Cal. 426.

[11] Phila. & R. R. Co. *v.* Pottsville W. Co. (Com. Pl.), 18 Pa. Co. Ct. Rep. 501. *But see* 182 Pa. St. 418.

company which supplies water to cities and public institutions, in so doing, is not exercising the rights of the riparian owner,[1] not if the taking affects injuriously the rights of other riparian owners.[2]

A company authorized to make a lock navigation in a public stream has not the privilege of a riparian owner, and may not swell the waters of the stream without being liable for damages suffered by riparian owners.[3]

A grant of the right to divert the waters of a brook "running over the grantor's land" does not confer the right to divert the two streams that by their junction form the brook, though they do not unite until after leaving the grantor's land;[4] but an appropriation of the waters of a stream to a beneficial use has been held an appropriation of its tributaries[5] above the point of diversion.[6]

63. Appropriations for Industrial Purposes.—The extent to which water may be appropriated for industrial purposes by a riparian owner will depend upon a reasonable use, having regard for the rights of other riparian owners, and depending not a little upon the good and indulgent neighbors above and below him upon the stream. Appropriation of waters for steam-boilers has been held reasonable if not excessive, but such a use has been held not to be a natural want.[7] It has been held that a riparian owner has a right to pump water from a stream to a reservoir, and to convey it thence by pipes to his dwelling-house upon any estate at a distance from a stream. This water may be applied to his domestic and all other necessary purposes, provided he takes only a reasonable quantity with reference to the size of the stream and the rights of his neighbors. He must not take more water by means of machinery than he otherwise would have a right to take.[8]

A railroad company owning riparian lands, or holding them by lease, and diverting water for the purpose of supplying its locomotives, does not thereby exercise its right of eminent domain, and consequently its right to the water is the same as that of any other riparian owner. Therefore, regardless of the needs of its business, it cannot enjoin the taking of the water by a water company duly proceeding under the power of eminent domain.[9] The fact

[1] Harding *v.* Stamford W. Co., 41 Conn. 87; Emporia *v.* Soden, 25 Kan. 588; Medway Nav. Co. *v.* Romney, 9 C. B. N. S. 575; Mills *v.* Waltham, 126 Mass. 422. *But see* Gillis *v.* Chase (N. H.), 31 Atl. Rep. 18; Vernon Irrig. Co. *v.* Los Angeles (Cal.), 39 Pac. Rep. 762.

[2] Lord *v.* Meadville W. Co. (Pa.), 26 W. N. C. 110. *See* Ingraham *v.* Camden W. Co., 82 Me. 335; *Re* Barre W. Co., 62 Vt. 27.

[3] Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379.

[4] Petrie *v.* Hamilton College (Sup.), 40 N. Y. Supp. 781.

[5] Low *v.* Rizor (Oreg.), 37 Pac. Rep. 82.

[6] Low *v.* Schaffer (Oreg.), 33 Pac. Rep. 678.

[7] 28 Amer. & Eng. Ency. Law 954; Elliott *v.* Fitchburg R. Co. (Mass.), 10 Cush. 191.

[8] Norbury *v.* Kitchin, 7 L. T. N. S. 685. *But see* Broadmoor Dairy *v.* Brookside W. & I. Co. (Colo.), 52 Pac. Rep. 792 [1897].

[9] Philadelphia & R. R. Co. *v.* Pottsville Water Co., 38 Atl. Rep. 404, 182 Pa. St. 418.

that the railroad does not need the water for domestic purposes does not entitle it to use it for other purposes.[1]

A mill-owner, having the subordinate right, must take notice when he is infringing on the right of his superior, and not reduce the water so low as to interfere with that right; and if he does so reduce it, he is liable for all the damages sustained by the owner of the superior right by delay through waiting for the water to accumulate.[2]

[1] Atty.-Gen'l *v.* Great Eastern Ry. Co. (Eng.), 23 L. T. N. S. 344; Elliott *v.* Fitchburg R. Co., 10 Cush. 195; Pennsylvania R. Co. *v.* Miller, 112 Pa. St. 34; Garwood *v.* N. Y. Central R. Co., 83 N. Y. 400; Swift *v.* Goodrich, 70 Cal. 103.

[2] Root *v.* Johnson, 26 Vt. 64 [1853].

CHAPTER VI.

WATERS FOR IRRIGATION IN ARID COUNTRIES.

71. Irrigation under the Common Law.—Irrigation, generally, is the operation of watering lands by artificial means for agricultural purposes. It is also defined as the act of wetting or moistening the ground by artificial means. While the strict definition is the application or use of waters to the soil for purposes of agriculture, yet most of the statute laws providing for irrigation expressly make mining, manufacturing, and other industrial uses of water lawful.

At common law irrigation was not a natural want which authorized an exclusive or undue appropriation by a riparian owner. The right to irrigate for the simple purposes of increasing the products of the soil was subordinate to the natural wants of other riparian owners, such as were necessary for their families, tenants, and stock; i.e., their uses for necessary domestic purposes.[1]* The use of water for watering the soil was not a natural want when there was a scarcity of water for the domestic uses of other riparian owners, and the right to divert the waters of a stream for purposes of irrigating lands of a riparian owner was always subject to the use of other riparian owners for natural wants, and was permissible only when there was no excessive diminution of waters.[2]

Under the common law, therefore, the appropriation of water by a riparian proprietor was to be determined, as has been set forth in the preceding chapter, by the reasonableness of the use, which depended upon the amount of water and the use to which it was put by other riparian owners, and with a proper regard for their rights and privileges to a reasonable use of the waters of the same stream. It permitted only a reasonable use of the waters of a stream for irrigating purposes, and the question of reasonable use was one of fact and depended upon the circumstances of each particular case.[3]

To-day it is a general law, based upon the common law, that the right to

[1] 11 Amer. & Eng. Encyclopædia of Law 846.

[2] Embry *v.* Owen, 6 Exch. 353; Wilts Canal Co. *v.* Swindon Water Co., L. R. 9 Ch. 455; Mastenbrook *v.* Alger (Mich.), 68 N. W. Rep. 213.

[3] *See* 11 Amer. & Eng. Ency. of Law 846, 847.

* *See* Secs. 51–69, *supra*.

use water for irrigation of lands is subordinate to the right of a coproprietor to supply his family, tenants, etc., their natural wants for necessary and domestic purposes.[1] A riparian owner may take as much water from a stream as is necessary for watering his cattle and for domestic purposes, even though it consume all the water of the stream.[2]

If the domestic wants and necessities of other riparian owners are supplied, a reasonable use of the water for purposes of irrigation may be had.[3] Its use must be shared equitably with other riparian proprietors.[4]

A riparian proprietor is entitled to a reasonable use of the waters of a stream, which has been defined as any use that does not work actual, material, and substantial damage to the common right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor.[5] He has no rights in the *corpus* of the water.[6] He may not obstruct the stream, as by a dam, so as to prevent the water running substantially as it was accustomed to run in its natural state.[7] He may not exhaust a head spring upon his land to the injury of lower owners.[8]

72. Local Irrigation Laws.—In England there was little need of laws for the irrigation of lands in comparison with the great necessity for irrigation by artificial means in America and Australia, where there are broad tracts of arid and unproductive lands which can be made fruitful only by irrigation. It may therefore be expected that the English common law affords but few decisions upon the subject of irrigation, and those cases that have come before the courts have been determined upon the same principles as have been explained by, and described in, the foregoing and succeeding chapters upon the diversion, detention, and appropriation of waters. In the early history of the United States, when only the eastern part of the country was inhabited, developed, and improved, there was little more necessity for laws upon the subject of irrigation than had existed in England; but as the march of civilization "wended its westward way," and was met by the broad, arid expanse of desert which covers parts of the western and Pacific states, and the development and cultivation of the lands of these states became dependent upon the economical use and application of water, special laws had to be enacted which should encourage

[1] Baker *v.* Brown, 55 Tex. 377.

[2] Union M. & M. Co. *v.* Dangberg, 2 Saw. 450; Ferrea *v.* Knipe, 28 Cal. 340; Hale *v.* McLea, 53 Cal. 578; Lux *v.* Haggin, 69 Cal. 255.

[3] Union M. & M. Co. *v.* Ferris, 2 Saw. 176; Ellis *v.* Tone, 58 Cal. 289; Anaheim W. Co. *v.* Semi-Tropic W. Co., 64 Cal. 185; Swift *v.* Goodrich, 70 Cal. 103; Hale *v.* McLea, 53 Cal. 578; Larned *v.* Tangeman, 65 Cal. 334; Gould *v.* Stafford, 77 Cal. 66; Coffman *v.* Robbins, 8 Oreg. 278.

[4] Shook *v.* Colohan, 12 Oreg. 239. *See* Low *v.* Schaffer (Oreg.), 33 Pac. Rep. 678.

[5] Union M. & M. Co. *v.* Dangberg, 2 Sawyer 450; Lux *v.* Haggin, 69 Cal. 255.

[6] Union M. & M. Co. *v.* Dangberg, 2 Saw. 450; Eddy *v.* Simpson, 3 Cal. 249; Hale *v.* Lea, 53 Cal. 578; Pope *v.* Kinman, 54 Cal. 3; Weiss *v.* Oreg. I. & S. Co., 13 Oreg. 496.

[7] Ferrea *v.* Knipe, 28 Cal. 341; Lobdell *v.* Simpson, 2 Nev. 274; Bliss *v.* Johnson, 76 Cal. 597; Taylor *v.* Welch, 6 Oreg. 198; Hayden *v.* Long, 8 Oreg. 244; Coffman *v.* Robbins, 8 Oreg. 278; Shively *v.* Hume, 10 Oreg. 76.

[8] Heming *v.* Davis, 37 Tex. 183.

the irrigation of the arid lands of these states, and which should secure to those parties who should design, develop, and construct irrigation works the assurance that their investments should be protected, and that they should have the benefit of prior appropriation of water and of prior occupation of the fields. To accomplish this several of the states have incorporated into their constitutions, provisions which in effect make the waters of springs and streams public property, and which expressly provide that the common-law doctrine of riparian rights shall not obtain or be in force in that particular state or territory.[1]

This desired effect is usually obtained by provisions in the constitutions of the states containing arid lands by which "the water of every natural stream in the state or territory is declared to be the property of the public and to be subject to the regulation, control, and appropriation of the state in the manner prescribed by the statute laws of the state."[2]

The common-law doctrine of water rights thereby has been superseded,[3] and these constitutional provisions have usually been supplemented by special legislative acts providing for the formation, organization, and government of irrigation districts or companies, with privileges and restrictions which are calculated to confer the greatest benefit to the largest area and to the greatest number of residents in the arid district, affording protection to the money invested in the improvement. In some states, as California and Colorado, these laws provide for the creation and government of such districts or companies in considerable detail, but they are altogether too voluminous to be included in a book of this character. They provide for the construction of irrigating canals or ditches, define the rights and liabilities of the persons who build the irrigating channels, determine the relative rights of the different irrigating companies or associations, their priorities, and the amount of water which each may appropriate under the conditions of its creation and organization. They also usually provide for the taxing or assessing of the district which is to be benefited, and for the relative rights of the persons who demand water for irrigating or other beneficial purposes from such companies or associations. In some states such companies are made common carriers, and as such do not and cannot have any property in the water itself, but are permitted only

[1] Reno S. M. & R. *v.* Stevenson (Nev.), 4 Law Rep. 60 [1889].

[2] See subject of "Waters or Water Rights" in the constitutions of the several states of California, Colorado, Idaho, Montana, North Dakota, Washington, and Wyoming, and the special irrigation laws enacted by the legislatures of Arizona, California, Colorado, North and South Dakota, Idaho, Kansas, Montana. Nebraska, Oregon, New Mexico, Texas, Utah, and Wyoming, which are collected and published in a "Report of the Special Committee of the United States Senate, in 1890, on Irrigation and Reclamation of Arid Lands," Public Documents, in 4 vols.

[3] The courts of the state of Nevada and Washington have declared that the common-law doctrine of riparian rights was unsuited to the conditions there existing. Reno S. M. & R. *v.* Stevenson (Nev.), 4 Law Rep. 60 [1889]; Benton *v.* Johncox (Wash.), 49 Pac. Rep. 495.

The colonization law of Texas and the statutes of the state recognize the right to use water for irrigation purposes. Tolle *v.* Correth, 31 Tex. 362.

to charge for the transportation or conduct of the water from place to place and the delivery of the same to the parties who have the right, under the laws, to demand a reasonable and proportionate use of the water so carried. This right to demand the use of waters depends largely upon the priority of application for water, the location of the land with respect to the ditch or to the stream from which the water is taken, and in some cases it depends upon the benefit to be derived from the use of such water.

The different methods of enforcing these regulations, whether by commissioners, or by boards representing irrigation districts, or by the courts, are matters with which the engineer usually has not to concern himself, and which are matters of procedure in different jurisdictions or states where litigation may arise. To prepare a thorough digest and exposition of the law upon the subject of irrigation in the different states would make too large a book, and therefore the reader must be content with a general exposition of the subject, such as may be contained in a chapter of a few pages.

Any engineer who is engaged in the subject of irrigation is recommended to secure from the Federal Government a copy of an excellent work, Report of the Special Committee of the U. S. Senate on the Irrigation and Reclamation of Arid Lands, in four volumes, published by the Government in 1890, which contains the constitutional and statute laws of all the states as they existed at that time, and in addition thereto many decisions.

It must be understood that what is herein contained is the law as it has been determined by the courts under the constitutions or statutes of the several states, and that while it has a general application throughout the states which contain arid districts, it cannot be taken literally for any particular state or jurisdiction.

73. Irrigation Rights by Prior Appropriation.—The early settlement and development of the arid districts of the western and Pacific states was owing to mining operations, the successful conduct of which required large supplies of water. The country being wild and uninhabited, the question of riparian rights did not then arise, because riparian owners did not exist; nor was there conflict between mining and the various industrial uses of agriculture, milling, and manufacture, because the latter were not developed. The operations of mining having the prior right of possession and use, and being the chief industry, the courts upheld such prior rights to water as paramount, upon the ground of local customs and local laws, and in order to foster and encourage the greatest industry of the country.

After the courts of the territories and states had accepted this doctrine of the right of prior appropriation and use for some years, it was recognized by act of Congress, July 26, 1866,[1] and became, either by original adoption

[1] Atchison *v.* Peterson, 20 Wall. 507; Basey *v.* Gallagher, 20 Wall. 670; Union M. & M. Co. *v.* Ferris, 2 Saw. 176; Cave *v.* Crafts, 53 Cal. 135; Osgood *v.* El Dorado W. & M. Co., 56 Cal. 571.

or by amendment, an important feature in the constitution of those states having large arid districts.

The act of Congress not only recognized the right of prior appropriation, but it also confirmed rights already held under the local customs, laws, and court decisions; it did not introduce any new or different policy on the part of the Government, but it recognized, sanctioned, protected, and confirmed the system already established, and provided for its continuance.[1] The act conferred upon appropriators of water from a natural stream the right to construct ditches across the public lands, subject only to the liability of paying for any damages to the possession of a settler on such lands.[2]

These rights of prior appropriation were afterwards extended to other beneficial uses, and particularly to that of irrigation for agricultural purposes. Colorado is said to be the first state to recognize the miner's law of prior appropriation of water as applicable, with restraining interpretation, to beneficial use in agriculture. The state, by its courts as well as by legislation, recognized as fundamental the principle of the public nature and property of all natural waters lying within a region so arid that agriculture cannot be carried on without the artificial conservation and distribution of the same. The state applied two qualifying interpretations to the doctrine of prior appropriation: one that the beneficial use which is the basis of such appropriation of water must necessarily be limited in its application by the wants of all other subsequent users—that is, that an appropriation made in days when necessity was unknown could not be construed to deprive the members of a growing community of their *pro rata* share after the first or prior appropriator had received his portion; the other, that, water being public property, the carriers of the same by means of ditches or other methods can claim no ownership or possession in the water itself. Their remuneration was to be derived from the transportation and distribution of the water through the channels which they have constructed to the lands on which it is needed. The water companies were and are common carriers, and their legal status is the same as that of railroads or other transportation companies.[3] As public carriers and *quasi*-public servants, they are charged with certain duties and subject to the reasonable control of the state in consideration of the privileges awarded to them.[4] They must furnish water at the established rate to the persons using it, as required by law, and by the articles of incorporation if the owner be a company.[5]

[1] Jennison *v.* Kirk, 98 U. S. 453; Broder *v.* Natoma W. Co., 101 U. S. 274; Vansickle *v.* Haines, 7 Nev. 249; Titcomb *v.* Kirk, 51 Cal. 288; Jones *v.* Adams, 19 Nev. 78.

[2] Hobart *v.* Ford, 6 Nev. 77; Shoemaker *v.* Hatch, 13 Nev. 261.

[3] Hinton's Report, vol. IV, page 72. Report on Irrigation and Reclamation of Arid Lands by Special Committee of U. S. Senate, *supra*.

[4] Price *v.* Riverside L. & I. Co., 56 Cal. 431; McCrary *v.* Beaudry, 67 Cal. 120; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582.

[5] Golden Canal Co. *v.* Bright, 8 Colo. 144; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582.

74. Prior Appropriator vs. Riparian Owners.—In arid districts the waters of natural streams may be appropriated by an upper riparian owner for irrigation of land, to the exclusion of the use thereof by a lower riparian owner for such purpose.[1] A valid appropriation of the waters of a stream, to the exclusion of a riparian owner, may be made for the purpose of irrigation, though the lands to be irrigated are not located on the banks or in the neighborhood of the stream.[2] In case of conflict between the appropriators of water in a given stream, that appropriation that is first in time is first in right.[3]

A right acquired by appropriation of water flowing through public land will be protected as against a subsequent purchaser of such land.[4] A prior appropriator of water from a natural stream flowing through state lands has such a vested right to the use of the water, and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of such diversion and existence of the ditch, obtains from the state a deed for the premises without reservation of any water rights.[5]

Miners and others, in a region where the artificial use of water is an absolute necessity, have the right, though not riparian proprietors, to appropriate for mining, irrigation, etc, the waters of non-navigable streams flowing through the public lands, so far as not already appropriated by others. The previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation.[6]

A law which gives unappropriated waters of a natural stream to the public, which may appropriate them for irrigation, cannot operate on the rights of riparian owners existing when the law was passed, but is intended to operate only on such interest as the state *had* by reason of its ownership of land bordering on natural streams.[7] One who has appropriated public land acquires a right to the use of water flowing through it, and this right is good as against every one except the Government and those who may have acquired prior rights thereto.[8]

The Civil Code of California, which provides that "the rights of riparian proprietors are not affected by the provisions of this title," declares in effect that those appropriating water under previous sections shall not acquire the right to deprive of the flow of the stream those who shall have obtained from the state the title to or right of possession in riparian lands, before proceedings leading to appropriation were taken.[9]

[1] Barrett *v.* Metcalfe (Tex. Civ. App.), 33 S. W. Rep. 758.

[2] Hammond *v.* Rose (Colo.), 19 Pac. Rep. 466 [1889]; Moyer *v.* Preston (Wyo.), 44 Pac. Rep. 845. *Semble* Hillman *v.* Hardwick (Idaho), 28 Pac. Rep. 438.

[3] Dunniway *v.* Lawson (Idaho), 51 Pac. Rep. 1032 [1898].

[4] Ramelli *v.* Irish (Cal.), 31 Pac. Rep. 41.

[5] Carson *v.* Gentner (Oreg.), 52 Pac. Rep. 506 [1898].

[6] Krall *v.* United States (C. C. A.), 79 Fed. Rep. 241.

[7] McGee Irr. D. Co. *v.* Hudson (Tex. Sup.), 22 S. W. Rep. 967.

[8] Crandall *v.* Woods, 8 Cal. 136; Leigh Co. *v.* Ind. D. Co., 8 Cal. 323; Huston *v.* Byhee (Oreg.), 2 Saw. Rep. 568 [1889].

[9] Lux *v.* Haggin, 69 Cal. 255.

The use of water for irrigation of a district has been held to be a public use even though the residents of the district did not have the right to use the water; and an assessment imposed to pay for such a public improvement has been held not to be a depriving of a landowner of his property without due process of law. If each landowner has the right to use a proportionate share upon the same terms as all the others, the use is a public, and not a private, one.[1]

75. Priority in Appropriation.—When the right to the waters of a stream depends upon the first appropriation of the waters thereof, promoters, engineers, and contractors will understand that it means "a hustle" between rival companies and their servants, who aim to secure first the right of prior appropriator. It is important, therefore, to know what constitutes an appropriation in the matter of time, as much as in the act itself.

The first appropriator of water from a natural stream upon the public lands is held to have a prior right thereto to the extent of such appropriation, if it was for a beneficial purpose,[2] and so long as the water is applied to a beneficial use.[3]

An appropriator acquires only the right of possession and use of the water, qualified by the rights of others to its use, in such manner as shall not materially diminish or deteriorate it, at the place of his appropriation in quantity or quality.[4] The persons above must allow the water to flow down to the point of diversion, so that the quantity and quality of the water appropriated shall not be diminished, and subsequent appropriators have the right to use water from said stream only in such manner as shall not cause any positive or sensible injury to former appropriators.[5]

[1] Fallbrook Irrigation Dist. *v.* Bradley, 17 Sup. Ct. Rep. 56; *reversing* 68 Fed. Rep. 948.

[2] Atchison *v.* Peterson, 20 Wall. 507; Basey *v.* Gallagher, 20 Wall. 670; Irwin *v.* Phillips, 5 Cal. 140; Tartar *v.* Spring Creek M. & Mg. Co., 5 Cal. 395; Hill *v.* Newman, 5 Cal. 445; Conger *v.* Weaver, 6 Cal. 548; Hoffman *v.* Stone, 7 Cal. 47; B. R. & A. W. & M. Co. *v.* N. Y. Mg. Co., 8 Cal. 327; Hill *v.* King, 8 Cal. 336; Butte Canal & Ditch Co. *v.* Vaughn, 11 Cal. 143; Ortman *v.* Dixon, 13 Cal. 33; McKinney *v.* Smith, 21 Cal. 374; Union Water Co. *v.* Crary, 25 Cal. 504; Davis *v.* Gale, 32 Cal. 26; Osgood *v.* El Dorado W. & M. Co., 56 Cal. 571; Himes *v.* Johnson, 61 Cal. 259; Brown *v.* Mullin, 65 Cal. 89; Junkans *v.* Bergin, 67 Cal. 267; Ware *v.* Walker, 70 Cal. 591; Schilling *v.* Rominger, 4 Colo. 100; Coffin *v.* Left Hand Ditch Co., 6 Colo. 443; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582; Golden Canal Co. *v.* Bright, 8 Colo. 144; Hammond *v.* Rose, 11 Colo. 524; Lobdell *v.* Simpson, 2 Nev. 274; Ophir Silver Mg. Co. *v.* Carpenter, 4 Nev. 534; Dalton *v.* Bowker, 8 Nev. 180; Barnes *v.* Sabron, 10 Nev. 217; Strait *v.* Brown, 16 Nev. 317; Jones *v.* Adams, 19 Nev. 78; Atchison *v.* Peterson, 1 Mont. 561; Barkley *v.* Tieleke, 2 Mont. 59; Keeney *v.* Carillo, 2 N. M. 480; Farmers' Highline Canal *v.* Southworth (Colo.), 4 Lawyers' Rep. 767 [1889]; Crane *v.* Winsor, 2 Utah 248; Monroe *v.* Ivie, 2 Utah 535; Kaler *v.* Campbell, 13 Oreg. 596.

[3] Wyatt *v.* Larimer & W. Irr. Co. (Colo. App.), 29 Pac. Rep. 906; *distinguishing* Wheeler *v.* Irrigation Co., 10 Colo. 582.

[4] Columbia Min. Co. *v.* Halter, 1 Mont. 296; Alder Gulch Con. Mg. Co. *v.* Hayes, 6 Mont. 31; Gassert *v.* Noyes (Mont.), 44 Pac. Rep. 959.

[5] Bear River & Auburn W. & M. Co. *v.* N. Y. Mg. Co., 8 Cal. 327; Hill *v.* King, 8 Cal. 336; Butte Canal & Ditch Co. *v.* Vaughn, 11 Cal. 143; Phœnix Water Co. *v.* Fletcher, 23 Cal. 482; Natoma W. & M. Co. *v.* McCoy, 23 Cal. 491; Nevada Water Co. *v.* Powell, 34 Cal. 109; Stein Canal Co. *v.* Kern Island Irr. Co., 53 Cal. 563; Lobdell *v.* Simpson, 2 Nev. 274;

Unless the prior appropriator is entitled to all the water of a natural stream, he cannot, in the nature of things, identify certain specific water as belonging to himself while the same remains in the natural channel. So long as he is able to secure the full amount of water to which he is entitled, he will not be heard to complain that others are diverting its waters.[1]

On the other hand, a prior appropriator may not extend his use of the waters to the prejudice or injury of subsequent appropriators.[2] His rights are fixed by his appropriation, and when others locate on the stream or appropriate the water, he cannot enlarge his original appropriation, or make any change in the channel to their injury. Each subsequent locator or appropriator is entitled to have the water flow in the same manner as when he located.[3]

Under a statute providing that, "as between appropriators, the one first in time is the first in right," the court must determine the date and amount of each appropriation, and from these facts determine the priority of right.[4]

Priority of right has been held to apply not only to the original appropriators of the waters from the stream, but to the consumers or water-takers from the ditch,[5] but not as against the company itself that has built the ditch.[6]

Notice of Appropriation.—It is sometimes required that notice of the appropriation be given and posted, after which a reasonable time is given to complete the canal and works.[7] The notice must be sufficient to put a prudent man on inquiry.[8] A notice of intention to appropriate water is evidence of possession, but of itself alone it is not sufficient. Taken with other acts it amounts to sufficient evidence. It forms one of a series of acts which taken together perfect the right.[9]

A notice duly posted is not affected or postponed by a second notice to take the same water, made while prosecuting the work. The claimant does not thereby abandon his rights under the first notice. Notices of intention to

Crane *v.* Winsor, 2 Utah 248; Reno Smelting M. & R. Works *v.* Stevenson (Nev.), 4 Lawyers' Rep. 60 [1889]; Coker *v.* Simpson, 7 Cal. 340; Kleinschmidt *v.* Greiser (Mont.), 37 Pac. Rep. 5.

[1] Saint *v.* Guerrerio (Colo. Supp.), 30 Pac. Rep. 335.

[2] McKinney *v.* Smith, 21 Cal. 374; Nevada Water Co. *v.* Powell, 34 Cal. 109; Higgins *v.* Barker, 42 Cal. 233; Stein Canal Co. *v.* Kern Island Irr. Co., 53 Cal. 563; Brown *v.* Mullin, 65 Cal. 89; Junkans *v.* Bergin, 67 Cal. 267; Lobdell *v.* Simpson, 2 Nev. 274; Proctor *v.* Jennings, 6 Nev. 83; Sieber *v.* Frink, 7 Colo. 148; Larimer County R. Co. *v.* People *ex rel.*, 8 Colo. 614.

[3] Union Mill & Mining Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[4] Kirk *v.* Bartholomew (Idaho), 29 Pac. Rep. 40 and 42; Riverside Water Co. *v.* Sargent (Cal.), 44 Pac. Rep. 560.

[5] Farmers' High-line Canal *v.* Southworth (Colo.), 4 Law Rep. 767 [1889]. *But see* Wyatt *v.* Larimer & W. Irr. Co. (Colo. App.), *post*.

[6] Wyatt *v.* Larimer & W. Irr. Co. (Colo. App.), 29 Pac. Rep. 906.

[7] Dyke *v.* Caldwell (Ariz.), 18 Pac. Rep. 276.

[8] Kimball *v.* Gearhart, 12 Cal. 27; Robinson *v.* Imperial Silver Mg. Co., 5 Nev. 44. *See* Moyer *v.* Preston (Wyo.), 44 Pac. Rep. 845.

[9] Conger *v.* Weaver, 6 Cal. 548; Thompson *v.* Lee, 8 Cal. 275; Columbia Mining Co. *v.* Holton, 1 Mont. 296.

appropriate water are to be liberally construed.[1] The notice should state the time and place of diversion, the purposes for which it is taken, the amount appropriated, and the place where it is to be used,[2] and it must be followed by an actual appropriation within a *reasonable time.*

Time or Date of Appropriation.—The right to waters of a natural stream is determined by priority of appropriation, but the water is not "appropriated" until it is applied to some *beneficial use.*[3] For certain purposes many cases have held the date of an appropriation of waters to be carried back to the time when the first steps were taken to secure it, if reasonable diligence had been exercised in prosecuting the work, although the appropriation was not deemed complete until the actual diversion and use of the waters.[4]

The waters diverted must be utilized for the purposes intended within a *reasonable time,* and the question as to what is a reasonable time is a question of fact depending upon the circumstances of each case.[5] The law does not require unusual or extraordinary effort, but only such diligence, constancy, or steadiness of purpose or labor as is usual with men engaged in like enterprises who desire a speedy accomplishment of their design—such progress as will manifest a good-faith intention to complete the works within a reasonable time.[6] It has been held that due diligence was exercised when an appropriator had posted a notice of appropriation and dug a ditch 15 or 20 feet in length, letting water into it on or about the middle of December, made a survey in January following, and did no more work until the latter part of February, because he was building a house on the land.[7] The fact that defendant's ditch broke before the water reached the land intended to be irrigated, and thus enabled another to first apply the water on his land, was held not to affect the prior appropriation.[8]

In determining whether the work has been prosecuted with diligence it is proper to take into consideration the circumstances surrounding the parties

[1] Osgood *v.* El Dorado Co., 56 Cal. 571.

[2] Floyd *v.* Boulder F. & M. Co. (Mont.), 28 Pac. Rep. 450.

[3] Farmers' High-line Canal *v.* Southworth (Colo.), 4 Law. Rep. Ann. 767; Bear Lake & R. W. & Irr. Co. *v.* Garland, 17 Sup. Ct. Rep. 7.

[4] Kelley *v.* Natoma Water Co., 6 Cal. 105; Maeris *v.* Bicknell, 7 Cal. 261; Kimball *v.* Gearhart, 12 Cal. 27; N. C. & S. C. Co. *v.* Kidd, 37 Cal. 282; Osgood *v.* Water & Mining Co., 56 Cal. 571; Ophir S. Mining Co. *v.* Carpenter, 4 Nev. 534; Irwin *v.* Strait, 18 Nev. 436; Sieber *v.* Frink, 7 Colo. 148; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582; Columbia Mg. Co. *v.* Holter, 1 Mont. 296; Union M. & M. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73; Water-sup. & Stor. Co. *v.* Larimer & Weld Irr. Co. (Colo.), 51 Pac. Rep. 496 [1897]; Nevada Ditch Co. *v.* Bennett (Oreg.), 45 Pac. Rep. 472.

[5] Conger *v.* Weaver, 6 Cal. 548; Maeris *v.* Bicknell, 7 Cal. 261; Parke *v.* Kilham, 8 Cal. 77; Cardoza *v.* Calkins (Cal.), 48 Pac. Rep. 1010; Kimball *v.* Gearhart, 12 Cal. 27; Weaver *v.* Eureka Lake Co., 15 Cal. 271; Sieber *v.* Frink, 7 Colo. 148; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582; Atchison *v.* Peterson, 1 Mont. 561; Keeney *v.* Carillo, 2 N. M. 480; Ophir S. Mg. Co. *v.* Carpenter, 4 Nev. 534.

[6] Kimball *v.* Gearhart, 12 Cal. 27; Ophir S. Mg. Co. *v.* Carpenter, 4 Nev. 534; Water-supply & S. Co. *v.* Larimer & W. Irr. Co. (Colo.), 51 Pac. Rep. 496 [1897].

[7] Dyke *v.* Caldwell (Ariz.), 18 Pac. Rep. 276 [1888].

[8] Wells *v.* Kreyenhagen (Cal.), 49 Pac. Rep. 128.

which would affect the undertaking, such as the nature and climate of the country, the conditions of the weather, and the difficulty in procuring labor and materials.[1] The matters to be considered are those incident to the enterprise and not those incident to the person, such as illness of the appropriator or his want of pecuniary means to prosecute the work.[2]

During construction of the works so much water may be taken as is necessary to save them from injury, though the arrangements for diverting and using of the waters are not complete and the appropriation is not perfected.[3]

The fact that one of three originators of the project dropped out does not affect the extent of the appropriation claimed, but it all inures to the benefit of those who carried on and completed the construction of the ditch.[4]

To become an appropriator of water it is *not* necessary to construct canals, ditches, flumes, or other works. If land is so situated that it is rendered productive by the natural overflow of water, the cultivation of such land by means of the water so naturally moistening the same is a sufficient appropriation of such water to the amount necessary for such use.[5] The method of diversion is immaterial; a riparian owner may pump water from a stream for irrigation purposes, provided he takes no more than his proportionate share. The amount he may take is not limited to that necessary for land to which the water may be led in ditches by the force of gravity, but extends to the taking, by pumps or otherwise, of water necessary to irrigate lands above the level of the stream.[6]

In connection with the subject of prior appropriation and the competition between appropriators to first acquire water rights in a stream, the attention of engineers and promoters should be called to the effect of estoppel upon the rights of competing companies or persons. If a person who has a right by prior appropriation to the use of the waters of a stream stands by and allows another to purchase from a third party wrongfully claiming to have the right to said water, without asserting or making known his claim, he may be estopped from afterwards asserting that claim.[7] A prior appropriator may not stand by and see another person or company appropriate the water of the same stream at great expense and under a mistaken idea that he was thereby acquiring a prior right to the waters thereof, and not inform him of his mistake.[8] Some courts hold that there must be some degree of turpitude in the conduct of the party before a court of equity will estop him from asserting his title, and that the mere fact that the true owners knew that a ditch was constructed at heavy cost, and that it was maintained and used without any

[1] Kimball *v.* Gearhart, 12 Cal. 27; Ophir S. Mg. Co. *v.* Carpenter, 4 Nev. 534.
[2] Ophir S. Mg. Co. *v.* Carpenter, 4 Nev. 534; Keeney *v.* Carillo, 2 N. M. 480; Cole *v.* Logan (Oreg.), 33 Pac. Rep. 568.
[3] Weaver *v.* Conger, 10 Cal. 233.
[4] Nevada Ditch Co. *v.* Bennett (Oreg.), 45 Pac. Rep. 472.
[5] Thomas *v.* Guiraud, 6 Colo. 530.
[6] Charnock *v.* Higuerra (Cal.), 44 Pac. Rep. 171.
[7] Fabian *v.* Collins, 3 Mont. 215.
[8] Parke *v.* Kilham, 8 Cal. 78; Dalton *v.* Rentaria (Ariz.), 15 Pac. Rep. 37 [1888].

objection or opposition on their part, was not sufficient to operate as an estoppel.[1]

Beneficial Use of Appropriation.—To constitute a legal appropriation under the irrigation laws, the waters must be applied to some *beneficial use* or purpose.[2] The true test is the successful application of the waters to the beneficial use designed. The method of diverting or carrying the water or of making the application is immaterial.[3]

The right of appropriation of water for irrigation depends on the application of the water to the intended use, and not on the capacity of the irrigating ditch.[4] An appropriator is required to make an economic use of the water appropriated. If the capacity of his ditches is greater than is necessary to provide for such use, he should be confined to the amount necessary for such economic use, though less than the capacity of his ditches;[5] but if a settler construct a ditch of sufficient capacity only to irrigate his entire tract of irrigable lands, and convey the water to only a small portion thereof, it is an appropriation to the extent of the capacity of the ditch entitling the owner to construct and maintain ditches to other portions of his land, provided the total amount of water taken does not exceed the capacity of his original ditch.[6] It is the amount of irrigable lands each proprietor owns that is the controlling element, and not the amount actually under cultivation at the time.[7]

Appropriation consists of diversion and use for a beneficial purpose and within a *reasonable time* after diversion.[8] A proprietor of a water right is entitled to so much water as he can put to a useful purpose on his lands within a reasonable time by the use of reasonable diligence; but after ten years from the date of the diversion it will be presumed that he has brought under cultivation all the land intended by him for cultivation by the use of the water.[9] As against one subsequent in right a prior appropriator can hold only the maximum quantity which he has devoted to a beneficial use at some time within the period by which his right would otherwise be barred for non-user.[10] He may afterwards re-enter if intervening rights have not attached.[11]

[1] Biddle Boggs *v.* Merced Mg. Co., 14 Cal. 279; Anaheim W. Co. *v.* Semi-tropic W. Co., 64 Cal. 185; Stockman *v.* Riverside L. & I. Co., 64 Cal. 57; Lux *v.* Haggin, 69 Cal. 255. *And see* Zimmler, Admr., *v.* San Luis W. Co., 57 Cal. 221.

[2] Maeris *v.* Bicknell, 7 Cal. 261; Weaver *v.* Eureka Lake Co., 15 Cal. 271: Davis *v.* Gale, 32 Cal. 26; Sieber *v.* Frink, 7 Colo. 148; Larimer R. Co. *v.* People *ex rel.* Luthe, 8 Colo. 614; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582; Dick *v.* Caldwell, 14 Nev. 167; Farmers' High-line Canal *v.* Southworth (Colo.), 4 Lawyers' Rep. 767 [1889].

[3] Thomas *v.* Guiraud, 6 Colo. 530.

[4] Low *v.* Rizor (Oreg.), 37 Pac. Rep. 82.

[5] Union Mill & Mining Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[6] McDonald *v.* Lannen (Mont.), 47 Pac. Rep. 648.

[7] Wiggins *v.* Muscupiabe Land & Water Co. (Cal.), 45 Pac. Rep. 160.

[8] Justice Helm of Sup. Ct. Colorado before U. S. Senate Committee—Vol. III, Public Documents, Irrigation and Reclamation of lands, 1890; Union M. & M. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[9] Senior *v.* Anderson (Cal.), 47 Pac. Rep. 454; Cole *v.* Logan (Oreg.), 33 Pac. Rep. 568.

[10] Smith *v.* Hawkins (Cal.), 52 Pac. Rep. 139 [1898].

[11] Beaver Brook Res. & C. Co. *v.* St. Vrain Res. & Fish Co. (Colo. App.), 40 Pac. Rep. 1066.

Any *beneficial use* will sustain a right acquired by appropriation, but the nature of a use may determine the *extent* of the appropriation. When water is appropriated from a stream, the rights secured are limited to so much water only as is necessary for that purpose. If there be any surplus, it may be taken by others,[1] and at such times as it is not needed or not used by the prior appropriator.[2] The prior appropriation gives only so much water as was appropriated for the purpose or purposes for which it was taken. In subordination to that amount, the remainder of the water in the stream may be taken by others.[3]

Water taken for a mill is not taken as an article of merchandise, to be sold in the market. The water having been taken for use as a motive power and having subserved that purpose, it may thereafter be taken by others.[4] A diversion for the purpose of drainage simply, and not to apply to some useful purpose, is not an appropriation within the laws of California, Colorado, and Nevada.[5]

Reasonable Use.—In ascertaining whether irrigation is reasonable, its effect, in depriving lower owners of natural irrigation, is to be considered with other circumstances.[6] A reasonable use has been stated to be "not so much whether the water below has been diminished thereby as whether the lower owner is materially injured by diminution, injured by not receiving the benefit in due proportion to which he and other owners are entitled."[7]

Mining, Agricultural, and Industrial Uses.—Both the Federal Government and the Western states recognize and protect the use of water for mining purposes, and an appropriator of the water of a natural stream cannot recover damages, it seems, for the pollution of his water by mining operations, so long as the quantity is undiminished.[8]*

[1] Ortman *v.* Dixon, 13 Cal. 33; McKinney *v.* Smith, 21 Cal. 374; Davis *v.* Gale, 32 Cal. 26; Nevada Water Co. *v.* Powell, 34 Cal. 109; N. C. & S. C. Co. *v.* Kidd, 37 Cal. 282; Edgar *v.* Stevenson. 70 Cal. 286; Butte Canal & Ditch Co. *v.* Vaughn, 11 Cal. 143; Barnes *v.* Sabron, 10 Nev. 217; Simpson *v.* Williams, 18 Nev. 432; Lobdell *v.* Simpson, 2 Nev. 274; Sieber *v.* Frink, 7 Colo. 148; Union M. & M. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[2] Smith *v.* O'Hara, 43 Cal. 371; Barnes *v.* Sabron, 10 Nev. 217; Becker *v.* Marble Cr. Irr. Co. (Utah), 49 Pac. Rep. 892 [1897].

[3] Butte Canal & Ditch Co. *v.* Vaughn, 11 Cal. 143; Ortman *v.* Dixon, 13 Cal. 33; McKinney *v.* Smith, 21 Cal. 374; Nevada Water Co. *v.* Powell, 34 Cal. 109; Higgins *v.* Barker, 42 Cal. 233; Brown *v.* Mullin, 65 Cal. 89; Junkans *v.* Bergin, 67 Cal. 267; Lobdell *v.* Simpson, 2 Nev. 274; Proctor *v.* Jennings, 6 Nev. 83; Barnes *v.* Sabron, 10 Nev. 217; Strait *v.* Brown, 16 Nev. 317; Chiatovich *v.* Davis, 17 Nev. 133; Thomas *v.* Guiraud, 6 Colo. 530.

[4] McDonald *v.* Bear River, etc., Co., 13 Cal. 220.

[5] Maeris *v.* Bicknell, 7 Cal. 261; Weaver *v.* Eureka Lake Co., 15 Cal. 271; Davis *v.* Gale, 32 Cal. 26; Sieber *v.* Frink, 7 Colo. 148; Larimer R. Co. *v.* People *ex rel.* Luthe, 8 Colo. 614; Wheeler *v.* Northern Colo. Irr. Co., 10 Colo. 582; Dick *v.* Caldwell, 14 Nev. 167; Farmers' Highline Canal *v.* Southworth (Colo.), 4 Lawyers' Rep. 767 [1889]; Thomas *v.* Guiraud, 6 Colo. 530; Wilson *v.* Higbee (C. C.), 62 Fed. Rep. 723. *See* North Powder Mill Co. *v.* Caughanour (Oreg.), 54 Pac. Rep. 223 [1898], *defining uses under a grant.*

[6] Lux *v.* Haggin, 69 Cal. 255, 396.

[7] Lux *v.* Haggin, *supra;* Van Hoeson *v.* Coventry (N. Y.), 10 Barb. 518.

[8] Bear Riv. W. Co. *v.* N. Y. Mg. Co., 8 Cal. 327.

* *But see* Secs. 201–229 and 217, *infra.*

In California the rule that governs the rights of several miners located on the same stream is that each is entitled to use in a proper and reasonable manner both the channel of the stream and the water flowing therein; and where, from the situation of the claims, the natural and necessary consequence of the working of some claims will result in injury to others, the latter must endure it, for it will furnish no cause of action to the party injured.[1] In California[2] and Utah[3] the appropriation of water for mining purposes is open to all persons. The legislature may not enact laws that will permit an irrigating company to control the waters of any part of the territory in disregard of the rights of individual claimants.[4]

However, the superior right of miners to waters depends upon priority of appropriation; and the waters of a stream must be taken and used in such a manner as not to interfere with or injure the property rights of others previously acquired.[5] The rights to work mines and to divert the water from natural channels stand upon an equal footing, and when they conflict they will be decided by the priorities.[6] If both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both will be allowed.[7]

Extent of Use.—An appropriation of all the water of a stream means all the water as it ordinarily flows. Another person may take the surplus in times of high water and freshets.[8] An appropriation for a beneficial use is an appropriation of all the tributaries thereof above the point of original diversion.[9] If a person or company be entitled to all the waters of a stream, he may enlarge the capacity of his ditch without considering other ditch-owners.[10]

By the erection of a dam across a natural waterway there is an actual appropriation of the waters of the stream down to that point, but no farther. What water flows over or through the dam any one may appropriate.[11] If the dam and ditch are sufficient for the purposes for which the appropriation was made in the natural condition of the stream as it then existed, the owner may not afterwards raise his dam higher to obviate obstructions to its use created by physical changes in the stream, whether natural or artificial, if such action would work injury to subsequent appropriators who were not responsible for the changes in the stream.[12]

In determining the quantity of water appropriated, it is proper to consider the acts of the person or company, the manner in which the ditch was con-

[1] Esmond *v.* Chew, 15 Cal. 137.
[2] Bear Riv. W. Co. *v.* N. Y. Mg. Co., 8 Cal. 327.
[3] Monroe *v.* Ivie, 2 Utah 535.
[4] Monroe *v.* Ivie, 2 Utah 535.
[5] Wixon *v.* Bear River, etc., Co., 24 Cal. 367; Hill *v.* Smith, 27 Cal. 476; Levaroni *v.* Miller, 34 Cal. 231; Logan *v.* Driscoll, 19 Cal. 623.
[6] Irwin *v.* Phillips, 5 Cal. 140.
[7] Jennison *v.* Kirk, 98 U. S. 453; Clark *v.* Willett, 35 Cal. 534.
[8] Edgar *v.* Stevenson, 70 Cal. 286.
[9] Low *v.* Schaffer (Oreg.), 33 Pac. Rep. 678.
[10] James *v.* Williams, 31 Cal. 211.
[11] Kelly *v.* Natoma W. Co., 6 Cal. 105. *But see* Natoma W. & Min. Co. *v.* Hancock (Cal.), 35 Pac. Rep. 334.
[12] Nevada Water Co. *v.* Powell, 34 Cal. 109.

structed, the general size, etc. The quantity is not limited to the amount first turned into the ditch, unless, by the general plan, size, and grade of the ditch, it was not capable of carrying more than was first diverted. If obstructions or irregularities in the grade of the ditch diminished the amount that its general size would indicate, the appropriator will be allowed a reasonable time to remove such obstructions or change the grade, and to then fill the ditch.[1]

The quantity appropriated is to be measured by the carrying capacity of the ditch or flume at its smallest point, where least water will pass through.[2] The capacity of a ditch, making due allowance for evaporation, seepage, etc., is the amount of water that it will carry from the point of diversion to the point of use.[3]

The grantee of a fixed supply of water is not required to reduce the quantity to which he is entitled by the grant, because modern appliances give equal efficiency of power to a smaller volume of water.[4]

Measurement of Water.—The measurement of a ditch to determine its carrying capacity, though ordinarily a question for engineers, has been made the subject of judicial determination. It has even been held not a question to be determined by an expert witness.[5]

Water in arid countries is usually measured by the *inch* ("miner's inch" or "water-inch"), which is that quantity of water that will flow during twenty-four hours through a circular opening one inch in diameter just below the surface of the water. It is about 500 cubic feet. The words "inch of water" have been held not to have acquired such an arbitrary meaning that will control when used in a grant. Evidence of the surrounding circumstances may be considered.[6]

A grant of so much water "out of a pond as would pass through a hole 10 inches square" was held not to call for any head of water.[7] A conveyance of the right "to tap a raceway at a certain point, and to build a race to a mill, and to use from the raceway" a certain number of inches of water for the purpose of running a mill was held to be a grant of a certain quantity of water to be measured at the grantor's raceway, and not of power to be measured at the mill.[8] A grant of so much water as can be pumped by a certain horse-power,[9] "except sufficient to operate the mills, which is limited

[1] White *v.* Todds Valley W. Co., 8 Cal. 443.

[2] Higgins *v.* Barker, 42 Cal. 233; Atchison *v.* Peterson, 20 Wall. 507; Ophir Mining Co. *v.* Carpenter, 6 Nev. 393; Caruthers *v.* Pemberton, 1 Mont. 111.

[3] Union Mill & Mining Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[4] Hartwell *v.* Mutual L. I. Co. (N. Y.), 50 Hun 497 [1888].

[5] Frey *v.* Lowden, 70 Cal. 550.

[6] Jackson Milling Co. *v.* Chandos (Wis.), 52 N. W. Rep. 759; Janesville Cot. M. *v.* Ford (Wis.), 52 N. W. Rep. 764. *See* Barrows *v.* Fox (Cal.), 32 Pac. Rep. 811, *and* Marshall *v.* Hershey (Pa.), 39 Atl. Rep. 887 [1898], *and* Gray *v.* Saco W.-P. Co., 85 Me. 526.

[7] Gray *v.* Saco W.-P. Co., 85 Me. 526. *But see* Forrest Mill. Co. *v.* Cedar Falls M. Co. (Ia.), 72 N. W. Rep. 1076.

[8] Palmer *v.* Angel (Sup.), 23 N. Y. Supp. 397.

[9] City Power Co. *v.* Fergus F. W. Co. (Minn.), 56 N. W. Rep. 685.

to 100 horse-power," was held to reserve only so much as was required, not exceeding 100 horse-power.[1]

The following rule has been approved as supported by expert evidence, and as justifying its adoption in measuring the flow of water: "Multiply the square root of the number of feet in the head by 8.025, and multiply this result by the square feet of the area of the discharge, and the result is the cubic feet of discharge per second." Engineers will recognize in this rule the familiar formula of discharge: vol. $= \sqrt{2gh} \cdot A$. In this same case it was held that a rule to determine the head by measuring from the crest of a dam to the middle of the tub-wheel—the center of the discharge from the spouts being several inches higher—was not justified by the weight of expert evidence and authority introduced, but that the nature of the case required the measure to be taken from the center of the orifice of discharge; and the court was also strongly inclined, for the same reason, to the opinion that the area of the orifice of discharge should be reduced by some coefficient of contraction.[2] The grant of a water privilege to an owner of a sawmill made an exception or reservation as follows: "Except, in times of low water, when it is wanted for the carding of cloth, dressing, and grist-mill." The grantee has no right to use the water when it is wanted for the purpose named in the exception. If he use the water when it is wanted for the purpose named, he will be liable for the damages occasioned by such use. The land may be conveyed and all water rights reserved to the grantor, or the use of all or a part of the water of the stream may be granted as a mere hereditament of the fee of the land retained. This is true notwithstanding that one cannot convey the water separate from the land. The reservation of water in a deed will ordinarily be construed as a reservation of a measure of the water, and not for a mere use. A change in the site of the mill by a mill-owner has been held not to change his rights to take as much water as before.[3]

The findings of a referee or court should state the quantity of water the plaintiff is entitled to have flow past the defendant's ditch in inches or gallons, and not merely by fixing the width, depth, and grade of the ditch.[4] A decree enjoining an appropriator of water against diverting from a stream any greater quantity of water than will flow through an iron pipe, of a certain size, which is found to be the amount required by him, is erroneous where the water is conducted in an open ditch or flume; as in such case the amount which reaches the place of use is not the same as that diverted, and the appropriator is entitled to such an amount, allowing for waste, as will yield the amount required at the place of use, and he is not obliged to substitute iron pipes.[5]

[1] Moore *v.* Wilder (Vt.), 28 Atl. Rep. 320.

[2] Hartwell *v.* Mutual L. I. Co., 50 Hun 497 [1888].

[3] Root *v.* Johnson, 26 Vt. 64 [1853].

[4] Settlers' Ditch Co. *v.* Hayes (Cal.), 22 Pac. Rep. 1152.

[5] Barrows *v.* Fox (Cal.), 32 Pac. Rep. 811.

Where there was no mill or penstock on the premises at the time a deed was executed granting a right to the quantity of water which would pass through a given aperture under 15 feet head, it will be inferred that the parties meant that the 15 feet head should be measured with the water at rest at the bulkhead.[1]

The grantee of a right to take from a bulkhead and flume "the quantity of water which shall be discharged therefrom through an aperture of 200 square inches at the gate under 15 feet head" is entitled to a constant power equivalent to a stream of water discharged through such an aperture with such a head.[1]

Point of Diversion or Use.—The point of diversion of the water to which an appropriator is entitled may be changed so long as the quantity taken is the same and the rights of others are not injuriously affected by the change,[2] but it cannot be changed if the rights of other appropriators are invaded.[3] The first appropriator cannot, to the detriment of subsequent appropriators, change the method by which he conveys water to his land, so as to increase the waste that naturally occurs in such conveyances.[4]

The right to change the point of diversion does not depend upon whether it was acquired by express grant or by prescription. Whether such right rests in the parole license or the presumed consent of the proprietor, he may change the point of diversion at pleasure if the rights of others are not injuriously affected by the change. The manner in which a right was secured relates to the mode of determining the existence and extent of a right, and not to the manner of its exercise and enjoyment.[5]

It has likewise been held that the point or place of application to the beneficial use designed or to the particular use to which it was first applied does not in any way affect the right acquired by prior appropriation.[6]

A natural watercourse may be utilized to conduct water that has been appropriated, and when a person or company avails himself (itself) of such stream to convey the water appropriated to the place where it is to be used or recaptured, he (it) does not abandon the water or lose acquired rights therein, but may divert the same quantity wherever he (it) desires to use it.[7]

[1] Cummings *v.* Blanchard (N. H.), 36 Atl. Rep. 556.

[2] Union M. & M. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73; McGuire *v.* Brown (Cal.), 39 Pac. Rep. 1060; Kidd *v.* Laird, 15 Cal. 151; Butte Table Mg. Co. *v.* Morgan, 19 Cal. 609; Junkans *v.* Bergin, 67 Cal. 267; Sieber *v.* Frink, 7 Colo. 148; Hobart *v.* Wicks, 15 Nev. 418; Santa Paula Waterworks *v.* Peralta (Cal.), 45 Pac. Rep. 168; San Luis W. Co. *v.* Estrada (Cal.), 48 Pac. Rep. 1075.

[3] Butte Table Mg. Co. *v.* Morgan, 19 Cal. 609; Nevada Water Co. *v.* Powell, 34 Cal. 109; Columbia Mg. Co. *v.* Holter, 1 Mont. 296; Gassert *v.* Noyes (Mont.), 44 Pac. Rep. 959. *And see* Wimer *v.* Simmons (Oreg.), 39 Pac. Rep. 6.

[4] Roeder *v.* Stein (Nev.), 42 Pac. Rep. 867.

[5] Kidd *v.* Laird, 15 Cal. 161.

[6] Atchison *v.* Peterson, 20 Wall. 507; Maeris *v.* Bicknell, 5 Cal. 261; McDonald *v.* B. R. & A. W. & Mg. Co., 13 Cal. 220; Davis *v.* Gale, 32 Cal. 26; Coffin *v.* Left-Hand Ditch Co., 6 Colo. 443; Thomas *v.* Guiraud, 6 Colo. 530; Woolman *v.* Garringer, 1 Mont. 535.

[7] Hoffman *v.* Stone, 7 Cal. 46; Butte Canal & D. Co. *v.* Vaughn, 11 Cal. 143;

In reclaiming his (its) water, care must be taken not to diminish the quantity to which prior locators or appropriators are entitled.[1] The burden is upon him (it) to show that he (it) has not taken more water from the stream than he (it) turned into it.[2]

In California and Colorado depressions or ravines on the public lands which include the bed of a stream may be utilized as reservoirs for storing waters by a person, but he must see to it that no legal rights of prior appropriators or other persons are in any way interfered with by his acts.[3] The owner of land has no right to construct a reservoir for the storage of water to be disposed of for irrigation purposes unless he appropriates the water in accordance with the provisions of the constitution and the statutes.[4]

It has been held, however, that an irrigation company cannot lawfully conduct seepage or surplus water from lands irrigated by it, through drains and lakes, into a canal from which others have a right to take water for irrigation and domestic purposes, to their injury. The owners of higher irrigated lands are not entitled to the benefit of the natural flow of seepage water therefrom onto lower lands owned by others.[5]

When a natural watercourse, as a ravine, is utilized as part of a ditch, the one diverting the water into the watercourse is liable for injuries to lands resulting from an overflow caused by his failure to have it properly cleared from obstruction, or by reason of his turning into it a quantity of water which, added to the natural waters flowing in it, exceeded its carrying capacity.[6]

76. Abandonment of Irrigation Rights.—When the waters of a stream have left the possession of a party, all his right to, and interest in, them are gone.[7] If, after using the water, he allows it to return to the stream without the intention of using it again, the water becomes a part of the stream and is subject to appropriation by another.[8] Even though he be a prior appropriator he cannot claim water after it has been abandoned by him and appropriated by another.[9] Waste waters which are returned to the main stream or its tributaries become a part of the waters of the main stream and tributaries, as though never diverted, and inure to the benefit of the appropriators, in the order of their appropriations.[10] After abandonment a prior right cannot, by

Davis *v.* Gale, 32 Cal. 26; Ellis *v.* Tone, 58 Cal. 289; Schulz *v.* Sweeny, 19 Nev. 359. *See* Gassert *v.* Noyes (Mont.), 44 Pac. Rep. 959.

[1] Butte Canal & D. Co. *v.* Vaughn, 11 Cal. 143; Burnett *v.* Whitesides, 15 Cal. 35; Wilcox *v.* Hausch, 64 Cal. 461.

[2] Butte Canal & D. Co. *v.* Vaughn, 11 Cal. 143; Wilcox *v.* Hausch, 64 Cal. 461.

[3] Larimer Co. R. Co. *v.* People *ex rel.*, 8 Colo. 614.

[4] Beaver Brook Res. & C. Co. *v.* St. Vrain Res. & F. Co. (Colo. App.), 40 Pac. Rep. 1066.

[5] North Point C. Irr. Co. *v.* Utah & S. L. Canal Co. (Utah), 52 Pac. Rep. 168 [1898]. *But see* Austin *v.* Chandler (Ariz.), 42 Pac. Rep. 483.

[6] Richardson *v.* Kier, 34 Cal. 63, 263.

[7] Eddy *v.* Simpson, 3 Cal. 249.

[8] Schulz *v.* Sweeny, 19 Nev. 359; Smith *v.* Green (Cal.), 41 Pac. Rep. 1022; Woolman *v.* Garringer, 1 Mont. 535.

[9] Eddy *v.* Simpson, 3 Cal. 249; Barkley *v.* Tieleke, 2 Mont. 59.

[10] Water Sup. & Stor. Co. *v.* Larimer & W. Res. Co., 53 Pac. Rep. 386.

making a sale of the same, be revived in favor of a grantee, even if the same is made in good faith.[1]

An attempt to convey a water right by an imperfect conveyance, while it may not operate as an absolute transfer, does clearly operate as an abandonment by the grantor of his right acquired by appropriation, and the right of the buyer relates to the date of his taking possession as an original appropriation by him.[2]

A failure to use water for a time is competent evidence on the question of abandonment. If nonuse be continued for an unreasonable period, it may fairly create a presumption of intention to abandon. This presumption is not conclusive and may be overcome by other satisfactory proofs.[3] The rights of a prior appropriator may be lost by his acquiescence in an adverse use by another during the period fixed by the statute of limitations.[4]

The facts that water was appropriated for a particular purpose, that the purpose has been fully accomplished, and that when accomplished the appropriators dispersed and allowed a long time to elapse without using the ditch and then sold it for a nominal sum, may be received in evidence as tending to shown an abandonment.[5] Evidence of nonuser of a water-ditch and right to appropriate water for three years was held not to show an abandonment where the owners testified that they did not intend to abandon their right, and it appeared that one of them, during the nonuser, purchased the other's interest.[6] An appropriator who for many years makes no use of the water, allows his ditch to become obliterated, and interposes no objections to the diversion of the water by a subsequent appropriator, will be presumed to have abandoned his right of priority.[7]

On an issue as to whether defendant manifested an intention to abandon a water appropriation, the evidence showed that defendant faithfully prosecuted improvements on his land, adding each year to the area in cultivation, and provided for the irrigation thereof from other and more convenient sources, but that he did not put the water in controversy to use until seven years after it was first appropriated. It was held that defendant's intention to abandon had not been established.[8]

The burden of proof is on the party claiming an abandonment of a water right.[9]

When water has been appropriated and used for one purpose, as mining

[1] Davis *v.* Gale, 32 Cal. 26.

[2] Barkley *v.* Tieleke, 2 Mont. 59; Nichols *v.* Lantz (Colo. App.), 47 Pac. Rep. 70.

[3] Davis *v.* Gale, 32 Cal. 26; Wimer *v.* Simmons (Oreg.), 39 Pac. Rep. 6; Sieber *v.* Frink, 7 Colo. 148; Tucker *v.* Jones (Mont.), 19 Pac. Rep. 571 [1889].

[4] Union Water Co. *v.* Crary, 25 Cal. 504; Davis *v.* Gale, 32 Cal. 26; Smith *v.* Logan, 18 Nev. 149. *But see* Wimer *v.* Simmons (Oreg.), 39 Pac. Rep. 6.

[5] Davis *v.* Gale, 32 Cal. 26.

[6] Gassert *v.* Noyes (Mont.), 44 Pac. Rep. 959.

[7] Dorr *v.* Hammond, 7 Colo. 79; Low *v.* Rizor (Oreg.), 37 Pac. Rep. 82 (thirteen years).

[8] Moss *v.* Rose (Or.), 41 Pac. Rep. 666.

[9] Beaver Brook Res. & C. Co. *v.* St. Vrain Res. & Fish Co. (Colo. App.), 40 Pac. Rep. 1066.

operations, it seems it does not become public property unless it has been turned back into its original channel without any intention of recapture. One who has used it as it flowed from the mine does not, it seems, acquire any rights in the wasted water unless it has been abandoned.[1]

One of several original appropriators (tenants in common) may recapture water that was abandoned and use it for irrigating his own fields or other lawful purposes.[2]

77. Nature of Irrigation Rights.—An irrigating-ditch and the water right appurtenant thereto are real property,[3] but courts of equity have expressed some doubt as to whether they would go so far to protect such property as they do to protect land held and cherished for itself.[4]

A water right acquired by a user of water under a contract with an irrigation company, being an easement in the ditch, is an incorporeal hereditament descendible by inheritance to the owner's heirs, and constitutes a freehold estate.[5]

An appropriator of water, so long as it continues to flow in its natural course, acquires no specific property in the water itself. His rights, like those of a riparian owner, are strictly usufructuary, i.e., an enjoyment of the profit and advantage of a thing which belongs to another, like a tenant.[6]

The water itself is not personal property, but a part of the realty; and although an appropriator be entitled to the flow of the water undiminished at the head of his ditch, he cannot maintain an action for the value of the water, as for personal property sold and delivered, against one who has wrongfully diverted the waters of said stream.[7] The right to running water may exist without private ownership of the soil, as when acquired by prior appropriation. That right must be treated as a right running with land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil. As such it has none of the characteristics of personalty.[8]

When water has been collected and stored in a pond or reservoir, the one who built the reservoir acquires a vested right of property in the reservoir and water, of which he cannot be divested for mining or other private purposes, and a court of equity will enjoin miners from injuring the reservoir or diverting the water therefrom.[9] It is only when water has been separated from the

[1] Woolman *v.* Garringer, 1 Mont. 535. *See* Davis *v.* Gale, 32 Cal. 26. *But see* McDonald *v.* Bear Riv., etc., Co., 13 Cal. 220, *and* Last Chance Min. Co. *v.* Bunker Hill Co. (C. C. Idaho), 49 Fed. Rep. 430.

[2] Meagher *v.* Hardenbrook (Mont.), 28 Pac. Rep. 451.

[3] Hill *v.* Newman, 5 Cal. 445; Lower Kings D. Co. *v.* L. K. R. & F. C. Co., 60 Cal. 408; Dodge *v.* Marten, 7 Oreg. 456. *But see* Tynon *v.* Despain (Colo. Sup.), 43 Pac. Rep. 1039.

[4] Clark *v.* Willett, 35 Cal. 534.

[5] Wyatt *v.* Larimer & Weld Irrigation Co. (Colo. Sup.), 33 Pac. Rep. 144.

[6] Eddy *v.* Simpson, 3 Cal. 243; Kidd *v.* Laird, 15 Cal. 161; McDonald *v.* Askew, 29 Cal. 200; Alder G. C. Mg. Co. *v.* Hayes, 6 Mont. 31.

[7] Parks C. & M. Co. *v.* Hoyt, 57 Cal. 44.

[8] Hill *v.* Newman, 5 Cal. 445.

[9] Rupley *v.* Welch, 23 Cal. 452; Jacob *v.* Lorenz (Cal.), 33 Pac. Rep. 119. *See* Butte Table M. Co. *v.* Morgan, 19 Cal. 609.

original or natural source of supply and has been collected in reservoirs, pipes, or conduits that it becomes personal property. It is then as much the subject of sale as ordinary goods and merchandise.[1]

When several persons separately appropriate the waters of a stream and are severally using the same under certain regulations, as to the time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any portion of the water thus appropriated.[2]

Owners of land along a stream associated under the irrigation laws, as a water company, become tenants in common of the water of the stream, and each landowner in the district is entitled to his share on paying his proportion of the expense.[3] As tenants in common, one joint owner cannot hold adversely to the others without expressly repudiating their rights.[4]

Transfer of Water Rights.—The right to water being a species of realty, it requires for its transfer the same form and solemnity as is required for the conveyance of any other real estate.[5] The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom acquired by appropriation, may be held, granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists.[6]

A sale of a water right separate from the land, whereby the water is applied to other lands, may be made if the rights of others are not infringed.[7]

Irrigation Rights Appurtenant to Land.—A right which secures to the owner of a tract of land water for irrigating or other purposes necessary to the beneficial enjoyment of the land becomes appurtenant to said land and passes by a conveyance of the land.[8]

Under the Civil Code of California, which provides that "a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another," it was held that when a landowner appropriated water and brought it on his land, and the land could not be advantageously used without the water, the fact that the license to convey the water over the premises of another was revocable did not prevent the water right from passing as appurtenant to the land.[9]

[1] Heyneman *v.* Blake, 19 Cal. 579.

[2] Lyttle Creek W. Co. *v.* Perdew, 65 Cal. 447.

[3] Smith *v.* North Canyon Water Co. (Utah), 52 Pac. Rep. 283 [1898].

[4] Moss *v.* Rose (Oreg.), 41 Pac. Rep. 666.

[5] Barkley *v.* Tieleke, 2 Mont. 59; Smith *v.* O'Hara, 43 Cal. 371. *And see* McDonald *v.* B. R., etc., Co., 13 Cal. 220; Union Water Co. *v.* Crary, 25 Cal. 504; Dalton *v.* Bowker, 8 Nev. 190.

[6] Union Water Co. *v.* Crary, 25 Cal. 504.

[7] Cache La Poudre Irr. Co. *v.* Larimer & Weld Reservoir Co. (Colo.), 53 Pac. Rep. 318 [1898].

[8] Cave *v.* Crafts, 53 Cal. 135; Farmer *v.* Ukiah W. Co., 56 Cal. 11; Standart *v.* Round Val. W. Co., 77 Cal. 399. *But see* Strickler *v.* Colorado Springs, 16 Colo. 61; Bloom *v.* West (Colo. App.), 32 Pac. Rep. 846.

[9] Crooker *v.* Benton (Cal.), 28 Pac. Rep. 953.

The right to the use of water for the irrigation of land, together with the ditch making such right available, was held to become so attached to the land, as part and parcel thereof, as to pass by a conveyance of the land without mentioning the water right, and to be subject to the liens and liabilities which attach to the land, and entitled to the same exemptions as the land.[1]

If the water right be appurtenant to land, it will pass with a grant of the land without mention being made thereof, and even though the grantor is not aware of the existence of the right.[2] A transfer by parole of a settler's right of entry of lands carries with it a water right appurtenant thereto, entitling the transferee to the benefits of the priority of the appropriation.[3]

A public use of water from a public stream by the government does not become appurtenant to the soil, so as to pass with it in a grant to private individuals; but such use is thereby abandoned, unless a like use is, by special and competent stipulations, passed to the grantee. One who derives title through a patent from the government, "subject to any vested and accrued water rights," is estopped from claiming as an appurtenance an appropriation of water from a public stream which had been used by the government, as against any persons who acquired rights, as appropriators, prior to the issuance of the patent.[4]

Where a water right has been acquired by means of a ditch used in carrying it, a conveyance of the ditch is a conveyance of the water right.[5] A right acquired by appropriation for the purpose of operating a mill on the stream passes by the transfer of the mill property.[6] This is not true, however, if the water rights be not the property of the grantor.[7] The converse is not true, for it has been held that the conveyance of the right to use the water of a river between certain points did not convey the land of a mill-site on the river;[8] and when one has built a mill upon a stream and appropriated the water-power at that point, he does not by the conveyance of the water at a point above his mill lose his prior right over one who has claimed the water below the mill for mining purposes.[9] The purchase by a mining company of a water-ditch and rights appertaining thereto was held not to make the ditch and water rights appurtenant to the mining claim.[10]

The rights to water of a trespasser do not become appurtenant to land which he occupies, and do not pass to a purchaser of the land from its true owner.[11] For a person to succeed in an action of ejectment he must show that he is entitled to possession of the premises, but he is not required to

[1] Frank *v.* Hicks (Wyo.), 35 Pac. Rep. 475.
[2] Turner *v.* Cole, 49 Pac. Rep. 971.
[3] McDonald *v.* Lannen (Mont.), 47 Pac. Rep. 648.
[4] Nevada Ditch Co. *v.* Bennett (Oreg.), 45 Pac. Rep. 472.
[5] Williams *v.* Harter (Cal.), 53 Pac. Rep. 405 [1898].
[6] McDonald *v.* B. R., etc., Co., 13 Cal. 220.
[7] Ginocchio *v.* Amador C. & M. Co., 67 Cal. 493.
[8] Robinson *v.* Imp. S. Mg. Co., 5 Nev. 44.
[9] McDonald *v.* Askew, 29 Cal. 200.
[10] Quirk *v.* Falk, 47 Cal. 453.
[11] Smith *v.* Logan, 18 Nev. 149.

show that he is entitled to the enjoyment of a stream of water running through his land, or that he was damaged by the diversion of its waters.[1]

Right of Way for Irrigation Canal or Ditch.—Under an act of Congress July 26, 1866, an appropriator of water from a natural stream has a right to construct a ditch across public lands of the United States, subject only to the liability of paying for any damage to the possession of a settler on the land.[2] This act operated as a grant of such rights of way, and of such ditches through which the water was running at the date thereof, as had been constructed over public lands prior to July 26, 1866, and in which rights had been acquired and recognized by the local customs, laws, and decisions of the courts.[3]

An appropriator, as against subsequent purchasers from the United States, has the right to go upon the land of such purchasers higher up the stream than the point of diversion of the water, and remove obstructions in the bed of the stream so as to cause its waters to flow in their natural channel to the point of diversion.[4]

The grant of the right of way for a ditch over a tract of land is an easement only, and not a grant of the land or the water flowing over it. When an easement is granted, nothing passes as an incident to such grant but what is necessary for its reasonable and proper enjoyment.[5] However, in California it has been held that a deed which conveys the right of way for an existing ditch is in effect a conveyance of the ditch itself.[6] In Colorado all lands are held to be subordinate to the dominant right of others who must necessarily pass over them to obtain the supply of water to irrigate their lands. It is not, therefore, necessary that there should be a conveyance in writing to establish an easement for right of way for an irrigating-ditch.[7]

A grant of the right to all water in a stream, and of the right to enter on the land of the grantor and construct and maintain all dams, ditches, pipes, or flumes necessary and proper for conveying such water over said land to the place of its use, vests in the grantee the right to convey said water at different times and places, or change or enlarge his ditch, and to use it in the manner he pleases if the grantor is not injured by such use.[8]

Public land is appropriated by one character of act, and water by another. The digging of a ditch on public land is not an appropriation of land for a mill-site nor a dam-site, nor is the mere appropriation of a mill-site an appropriation of water for milling purposes.[9]

[1] Dilley *v.* Sherman, 2 Nev. 67.
[2] Hobart *v.* Ford, 6 Nev. 77; Shoemaker *v.* Hatch, 13 Nev. 261.
[3] Broder *v.* Natoma W. Co., 50 Cal. 621, and 101 U. S. 274.
[4] Ware *v.* Walker, 70 Cal. 591.
[5] Miller *v.* Vaughn, 8 Oreg. 333.
[6] Reed *v.* Spicer, 27 Cal. 57.
[7] Yunker *v.* Nichols, 1 Colo. 551.
[8] Spear *v.* Cook, 8 Oreg. 380; Conger *v.* Weaver, 6 Cal. 548.
[9] Robinson *v.* Imperial Silver Mg. Co., 5 Nev. 44.

CHAPTER VII.

DETENTION OF WATERS OF STREAMS. MILLS AND MILL RIGHTS.

81. The Detention and Obstruction of Streams.—A riparian owner may detain the waters of a stream to a reasonable extent; but if the use which he exercises be not a reasonable use, he is guilty of a nuisance to any other riparian owner who is injured thereby.[1] An excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use.[2] The reasonableness of the use to which a riparian owner is entitled is a question of fact to be determined by the jury, and will depend upon the capacity of the stream, the number of people entitled to its use, the adaptation of the machinery, and all attending circumstances.[3]

All the attending and conflicting interests and uses of households, mills, and other manufacturing and industrial purposes may be considered. It has been held that water might be detained twice a year for six days at a time in order to flood cranberry-meadows, even though such detention affected the operations of a grist-mill.[4]

82. The Use Must Be Beneficial and Reasonable.—If water in its natural state be useful both for domestic uses and for watering stock, and the latter use is more valuable or beneficial for all the owners along the stream than for domestic purposes, then the less valuable must yield to the more valuable use, but its reasonable use for all purposes should be preferred if possible.[5] The use of water for the operation of a mill has been held to be superior to the water-supply of a railroad company.[6] It has been held that there is no superiority of rights acquired in the water of a stream for the purpose of irrigating arable land over rights acquired therein for mining or milling purposes.[7]

[1] 28 Amer. & Eng. Ency. Law 955, *and cases cited*; Mason *v.* Hoyle, 56 Conn. 255 [1888].

[2] Union Mill & Min. Co. *v.* Dangberg (C. C. D. Nev.), 81 Fed. Rep. 73, *citing* Combs *v.* Agricultural Ditch Co., 17 Colo. 146; Ferrea *v.* Knipe, 28 Cal. 340; Gibson *v.* Puchta, 33 Cal. 310; Shotwell *v.* Dodge, 8 Wash. 337.

[3] Mason *v.* Hoyle, 56 Conn. 255 [1888].

[4] Hinchley *v.* Nickerson, 117 Mass. 213; Hetrich *v.* Deachler, 6 Pa. St. 32. *And see* Denison Paper Co. *v.* Robinson Mfg. Co., 74 Me. 116, as to the uses of water by a mill during drought.

[5] Hazeltine *v.* Case, 46 Wis. 391.

[6] Louisville & N. R. Co. *v.* Beauchamp (Ky.), 40 S. W. Rep. 679.

[7] Union Mill & Mining Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

The fact that the party detaining the water has tapped or collected new sources of supply, and that the lower owner is receiving more water than theretofore, is not a justification of the detention of water. The justification must be a reasonable use, and no one whose rights are injured by such a use has a right of action without showing actual damage.[1]

A wanton, vexatious, or unnecessary detention of waters will render the owner liable in damages to those injured thereby,[2] but parties whose rights are not affected cannot complain of the nuisance.[3] The fact that the lower owner himself partially obstructs the stream will not prevent his recovery against one who obstructs it to his injury.[4]

83. Detention of Waters by Dams.—Rights of a riparian owner to the reasonable use of the water of a stream include the right to confine and obstruct its flow by dams, in order to utilize its power, and to use it for other purposes. He may hold the water for a reasonable length of time for such use, even though it interfere with the rights of lower owners to a reasonable use of the stream in its natural state.[5] The purpose for which the water is collected must be one that is reasonably adapted to the stream in its normal condition. The water may not be accumulated for any purpose, as the operation of machinery, which requires more than the usual flow. Waters may be detained for the purpose of making a fish-pond,[6] or to make a pond from which to harvest ice.[7]

A landowner may detain the water of a stream passing through his land long enough for the proper and profitable enjoyment of it.[8] It has been held that a cotton-mill could shut off the water at night notwithstanding that it was to the disadvantage of paper-mills below it, which required water day and night.[9] The use of the water of a stream for power purposes is not a nuisance if it does not obstruct the flow of water above the proprietor's lands and he restores the water to its natural course before it leaves his lands.[10] The natural flow of water may be stopped until a mill-pond is full, it being kept full thereafter, although a lower mill-owner may suffer an impairment of his privilege.[11]

A coffer-dam was held not a dam in the ordinary acceptation of the term,

[1] Ware *v.* Allen, 140 Mass. 513. *And see* Glassell *v.* Verdugo (Cal.), 41 Pac. Rep. 403.

[2] 28 Amer. & Eng. Ency. Law 957, *and cases cited.*

[3] Groat *v.* Moak, 26 Hun 380.

[4] Clarke *v.* French, 122 Mass. 419; Brown *v.* Dean, 123 Mass. 254.

[5] 28 Amer. & Eng. Ency. Law 957.

[6] Wood *v.* Edes, 2 Allen (Mass.) 580.

[7] Gehlen *v.* Knorr (Ia.), 70 N. W. Rep. 757; De Baum *v.* Bean (N. Y.), 29 Hun 236; New London W. Bd. *v.* Perry, 69 Conn. 461.

[8] Platt *v.* Johnson (N. Y.), 15 Johns. 213.

[9] Bullard *v.* Saratoga Mfg. Co., 77 N. Y. 525; Louisville & N. R. Co. *v.* Beauchamp (Ky.), 40 S. W. Rep. 679.

[10] Ewing *v.* Colquhoun (Eng.), L. R. 2 App. Cas. 839; Green Bay Co. *v.* Kaukauna W. P. Co. (Wis.), 61 N. W. Rep. 1121.

[11] Gehlen *v.* Knorr (Ia.), 70 N. W. Rep. 757; Caldwell *v.* Sanderson, 69 Wis. 62; Sparlin *v.* Gotcher (Oreg.), 31 Pac. Rep. 399.

in a statute requiring claims for damages caused by overflow of water by the erection of dams and other canal improvements to be made within a year.[1]

84. Alternate Obstruction and Release of Waters.—The use must be adapted to the capacity of the stream. In determining its capacity, its condition throughout the year is to be considered. Where there is an ample supply for nine months and a scarcity for three, this scarcity, if it occurs so regularly that it can be anticipated, is to be treated as a fixed quantity in the estimate, and as so far reducing the capacity of the stream. A reasonable use must permit the water to flow in its accustomed way, so far as it can be done, and a beneficial use, though a limited one, be made of the reduced stream. The capacity of the reservoir of the upper mill does not determine its right to the detention of the water nor the capacity of the mill. It is for the public interest that water-power be used so far as it can be, if the majority of mill-owners are small ones. They should be protected against such a use of the stream, by mills disproportioned to its capacity, as would practically deprive them of water and ruin their privileges.[2]

A reasonable use of waters entitles a landowner to release and discharge the waters in order to employ them beneficially. He is not liable for injuries necessarily caused to others in regard to the rise of the stream.[3] If the withdrawal of the water deprives another from the use of waters to which he is justly entitled, or needlessly deprives him of the beneficial use of the water, or if it injures or destroys another's property, a case for damages arises.[4] A mill-owner may not open his gates and let water run to waste when an owner on the opposite side of the stream takes water from the same dam, and is entitled to all the water not needed by the former.[5] A riparian owner may not collect large quantities of water in the wet season and then draw it off in summer so as to cause a flood, washing away banks and drowning the land of other riparian owners.[6] It has been held that for such an act an action for trespass *vi et armis* would lie.[7]

The owner of a mill-dam may not complain because an upper riparian owner uses the water so as to expose his dam to the sun, the operation of the mill not being impeded.[8] The owner of a water-power right is not liable for allowing the water to run through his wheel at night to prevent it from becoming frozen.[9]

The fact that a riparian owner who has a right to a certain number of cubic feet of water per minute constantly wastes part of the water so purchased does not entitle an upper owner, who took subject to the purchase, to

[1] Heacock *v.* State (N. Y.), 11 N. E. Rep. 638 [1887].
[2] Mason *v.* Hoyle, 56 Conn. 255 [1888].
[3] Drake *v.* Hamilton W. Co., 99 Mass. 574.
[4] 28 Amer. & Eng. Ency. Law 959.
[5] Fuller *v.* Daniels, 63 N. H. 395.
[6] Gerrish *v.* Newmarket Mfg. Co., 30 N. H. 478.
[7] Kelly *v.* Lett (N. C.), 13 Ired. 50.
[8] Louisville & N. R. Co. *v.* Beauchamp (Ky.), 40 S. W. Rep. 679. Cattle treading and tramping a dam, *see* Keller *v.* Fink (Cal.), 37 Pac. Rep. 411.
[9] Cummings *v.* Blanchard (N. H.), 36 Atl. Rep. 556.

withhold a part of the other's water equal to the amount which the other wastes.[1]

One not injured by the maintenance of a dam by which a mill is operated cannot, when sued by the mill-owner for obstructing the natural flow of the stream to the mill, defend by setting up that the dam was constructed by plaintiff without proper authority.[2]

85. Backing Up and Overflow of Waters Dammed.—In raising the level of waters of a stream on one's land, he must be careful not to raise the natural surface of the water on or against others' lands. If he do so, he is liable for the injury, which is a question for the jury to decide, whether or not the alleged obstruction caused the injuries.[3] If another's lands are overflowed by a backing up of the water and damages ensue, the one causing the injury is liable for the damages thereof; but no action, it seems, lies unless some actual injury is sustained.[4] If the dam be built so as to cause the overflowing of another's land at an ordinary or expected freshet, the owner of the dam will be liable for the injuries.[5]

The ordinary stage of water has been held to include its stage or level in such rises as are usual, ordinary, and reasonably to be expected, but not to include such stages or levels in extraordinary freshets as could not reasonably be anticipated at particular periods of the year.[6] Unusual freshets occurring once in several years must be provided against.[7]

The fact that water is set back, it seems, is not determined arbitrarily by instrumental measurements, such as leveling. If the actual facts show a turning back of the water upon an adjoining owner's land, the owner of the dam may be liable,[8] even though field operations of leveling show more fall on his land than he has height at his dam.[9]

When land has been overflowing above a bridge, and the evidence showed that below the bridge the water was caused to rise several feet by a dam, and that above the bridge the water was two feet higher than below it, it was error to rule that no recovery could be had on account of the dam, because the water

[1] Home Elec. L. & P. Co. *v.* Globe Tissue-Paper Co. (Ind. Sup.), 45 N. E. Rep. 1108.

[2] Wooden *v.* Mt. Pleasant L. & Mfg. Co. (Mich.), 64 N. W. Rep. 329.

[3] Townes *v.* Augusta (S. C.), 23 S. E. Rep. 984. *See* Matthews *v.* Metcalf (Ia.), 66 N. W. Rep. 189.

[4] Cooper *v.* Hall, 5 Ohio 321; Irwin *v.* Janesville Cot. Mills (Wis.), 60 N. W. Rep. 786.

[5] Casebeer *v.* Mowry, 55 Pa. St. 419; Bell *v.* McClintock (Pa.), 9 Watts 119; State *v.* Ousatonic W. Co., 51 Conn. 137; Coloney *v.* Farrow (Sup.), 36 N. Y. Supp. 164; Allen *v.* Chippewa Falls, 52 Wis. 430; Bristol Hy. Co. *v.* Boyer, 67 Ind. 236; Dorman *v.* Ames, 12 Minn. 451; Ames *v.* Cannon R. Mfg. Co., 27 Minn. 245; Richardson *v.* Kier, 37 Cal. 263. As to what is the ordinary stage of the water, and its relation to the freshet stage of the stream, *see* McCoy *v.* Danley, 20 Pa. St. 85; Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379.

[6] Ames *v.* Cannon R. Mfg. Co., 27 Minn. 245.

[7] Gray *v.* Harris, 107 Mass. 492.

[8] Brown *v.* Bush, 45 Pa. St. 61.

[9] Brown *v.* Bush, 45 Pa. St. 61. *But see* Newland *v.* Hudson R. Co. (Sup.), 16 N. Y. Supp. 654, *and* Clement Mfg. Co. *v.* Wood (Mass.), 38 N. E. Rep. 444, *and* Esson *v.* Wattier (Oreg.), 34 Pac. Rep. 756.

was higher above than below the bridge, since, but for the dam, the water below the bridge would have passed off and increased the flow under it, thus relieving the backwater above.[1] If the banks of the stream were high and contracted below the dam, so that the water was as high below as above the dam, such a condition of things might be shown.[2]

A landowner may recover for injury to his land resulting proximately from the maintenance of a dam on his neighbor's premises, though such injury was aggravated by other causes not within defendant's control;[3] but *not*, it seems, if the same injuries would have resulted without the negligent act of providing insufficient outlet for the waters.[4] The negligence of the defendant must have caused the injury.

If a dam cause an ice-jam which dams up the waters of a stream, it seems that the company owning the dam may be held responsible for injuries resulting.[5] The opinions of witnesses as to the cause of the ice-jam are held inadmissible, even though they live in the neighborhood and knew the condition of the river before the boom was built.[5]

If a river-boom cause the overflow of land and crops, the owners may be required to pay damages.[6] That a defective boom was remedied as soon as possible, and that the conditions as to high water, floating ice, and the number of logs in the boom were unusual, does not relieve the owner from liability to a riparian owner for damage occasioned by water being backed upon his land.[7] Evidence that a logging boom was so constructed as to require "protection," and a "cushion" of logs to "strengthen" it, is sufficient to sustain a finding of a defect in the boom.[8] Where a riparian owner seeks to recover for injuries to his land from an overflow alleged to have been caused by a dam constructed by a booming company, the burden is on him to show that the waters which caused the injury were raised by the dam above ordinary high-water mark and out of the well-defined channels of the stream.[9]

The liability depends upon whether there was negligence. When logs form a gorge and are suddenly released, causing the stream to overflow, the plaintiff, in order to recover for the damage done, must show a want of ordinary care.[10]

A mill-owner has a cause of action against one who, by piling logs on the

[1] Payne *v.* Kansas City R. Co (Mo. Sup.), 20 S. W. Rep. 322. *But see* Hodge *v.* Lehigh Val. R. Co. (C. C.), 56 Fed. Rep. 195.

[2] Rucker *v.* Athens Mfg. Co., 54 Ga. 84.

[3] Cline *v.* Baker (N. C.), 24 S. E. Rep. 516.

[4] James *v.* Kansas City, etc., R. Co., 69 Mo. App. 431.

[5] Shaw *v.* Susq. Boom Co., 125 Pa. St. 324.

[6] McKenzie *v.* Miss. Boom Co., 29 Minn. 288.

[7] Doucette *v.* Little Falls Imp. & Nav. Co. (Minn.), 73 N. W. Rep. 847 [1898]; Rogers *v.* Coal R. B. & D. Co. (W. Va.), 23 S. E. Rep. 919.

[8] Doucette *v.* Little Falls Imp. & Nav. Co., *supra*.

[9] Gniadek *v.* Northwestern Imp. & Boom Co., 75 N. W. Rep. 894.

[10] Hopkins *v.* Butte & M. Com. Co. (Mont.), 33 Pac. Rep. 817.

ice above the mill when the stream is frozen over, interrupts the natural flow of the stream to the mill.[1]

Actual possession by one who is not the owner of the fee is sufficient to give him a right to damages.[2] The fact that the watercourse is not a permanent stream, or that the party doing the act is a city, makes no difference. The liability for flooding the lands of another remains.[3]

86. Injunction to Prevent the Detention or Obstruction of Waters.—Damming of waters of a stream so that they set back and interfere with the operation of a mill[4] may be enjoined by injunction. The raising of the level of the water must not be so as to interfere with the drainage of another's land.[5] The detention and collection of water by a dam which becomes stagnant and injurious to the health of the community will be prohibited by injunction.[6] If the mill be a great public convenience and it is proposed to rebuild the dam so that the owner's land will be flooded and the health of his family injured, an injunction may be denied and the plaintiff required to bring action for his damages.[7]* In such cases it has been held that the expense of sickness and loss of time could be recovered.[8]†

One may in the same action seek damages for injury to water rights and injunction.[9]

Where plaintiff's land was overflowed during the winter freshets, his application for an injunction to restrain the building of a dam on the stream should be denied, since it cannot be inferred that the damage from overflow would be augmented by its existence.[10]

87. Liability for Defective Construction of Dam or Barrier.—To avoid liability, the owner must have built his dam so as to be free from defects, or as free as reasonable care, forethought, and judgment could devise. If built with that reasonable care which prudent men would use, and no negligence is shown in its care or management, the owner will not be liable for damages caused by its breaking.[11] A dam must be able to resist not merely ordinary

[1] Wooden *v.* Mt. Pleasant L. & Mfg. Co. (Mich.), 64 N. W. Rep. 329.

[2] Allen *v.* McCorkle (Tenn.), 3 Head 181.

[3] Rose *v.* St. Charles, 49 Mo. 509.

[4] McIntosh *v.* Rankin (Mo. Sup.), 35 S. W. Rep. 995; Newland *v.* Hudson R. Co. (Sup.), 16 N. Y. Supp. 654; Rothery *v.* N. Y. Rubber Co. (N. Y.), 24 Hun 172; Matthews *v.* Metcalf (Iowa), 66 N. W. Rep. 189; 28 Amer. & Eng. Ency. Law 960.

[5] Sims *v.* Smith, 7 Cal. 149; Treat *v.* Bates, 27 Mich. 390; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 569.

[6] Montezuma *v.* Minor, 73 Ga. 484; Thomas *v.* Calhoun, 58 Miss. 80; Mayo *v.* Turner (Va.), 1 Munf. 405; Masonic Temp. Assn. *v.* Banks (Va.), 27 S. E. Rep. 490; 28 Amer. & Eng. Ency. Law 960, *and cases cited.*

[7] Daugherty *v.* Warren, 85 N. C. 136.

[8] Mills *v.* Hall (N. Y.), 9 Wend. 315; 28 Amer. & Eng. Ency. Law 960, *many cases cited.*

[9] Watterson *v.* Saldunbehere (Cal.), 35 Pac. Rep. 432.

[10] Esson *v.* Wattier (Or.), 34 Pac. Rep. 756.

[11] New York *v.* Bailey (N. Y.), 2 Den. 433; Darling *v.* Thompson (Mich.), 65 N. W. Rep. 754; Sterling Hyd. Co. *v.* Williams, 66 Ill. 393; Rich *v.* Keshena Imp. Co., 56 Wis. 287; Hoffman *v.* Tuolumne Co. W. Co., 10 Cal. 413; Wolf *v.* St. Louis I. W. Co., 10 Cal. 541; Everett *v.* Hyd. F. T. Co., 23 Cal. 225, Arave *v.* Idaho C. Co. (Idaho), 46 Pac. Rep. 1024.

* *See* Secs. 209, 219, *infra.*

† *See* Sec. 223, *infra.*

freshets, but such extraordinary floods as might reasonably be expected.[1] The fact that a flood which overflowed a person's land was higher than had ever before been known will not relieve the owner thereof from liability, if the river was one subject to sudden rises and increased volume.[2]

Where a dam was washed away by a phenomenal flood that no one could expect, the owner was held not liable. Where a dam was washed away which had no waste-weir or flagging over the dirt filling between the walls of the dam, and experts testified that it was not safe to build a dam without a waste-weir, and another witness testified that he would not build such a dam without a waste-weir, the question of negligence in its construction is properly for the jury.[3]

88. Maintenance and Repair of Dam.—The owner of a dam must use proper care in repairing and protecting it.[4] A purchaser of an unsafe dam who fails to make it safe, and to so maintain it as not unnecessarily to endanger life or property, is liable for injuries caused thereby.[5]

One to whom a reservoir is leased in consideration of his completing its construction and maintaining it is an "owner" within the meaning of an act providing that the owners of reservoirs shall be liable for floods from the breaking of the embankments.[6]

When a state has granted a public work to a corporation, the grantee corporation is discharged from those duties to the public growing out of the work which the state had provided before the grant was made, unless there are express words in the grant which impose such duties upon the corporation.[7]

Where one owns a dam and pond, and another a right to draw water therefrom, there being no contract to maintain the dam, either may abandon the power and free himself from its maintenance; but either has the right to maintain the power, and to have the other, till such abandonment, contribute his share of the expense. One such owner cannot recover from the other for damages caused by unnecessary delay in repairing the dam, since he has the right to prevent such damage by making the repairs himself and compelling contribution.[8] A deed granting merely the right of drawing water from a dam imposes no obligation upon the grantor or his assignee to rebuild the dam when swept away.[9]

[1] New York *v.* Bailey (N. Y.), 2 Den. 433; Lapham *v.* Curtis, 5 Vt. 379.

[2] Mundy *v.* N. Y., etc., R. Co. (N. Y.), 75 Hun 479.

[3] Cottrell *v.* Marshall Infirmary (Sup.), 24 N. Y. Supp. 381.

[4] Weidekind *v.* Tuolumne Co. W. Co. (Cal.), 12 Pac. Rep. 387 [1887]; Darling *v.* Thompson (Mich.), 65 N. W. Rep. 754; Arave *v.* Idaho C. Co. (Idaho), 46 Pac. Rep. 1024; Rigdon *v.* Temple W.-w. Co. (Tex.), 32 S. W. Rep. 828.

[5] Town of Monroe *v.* Connecticut River Lumber Co. (N. H.), 39 Atl. Rep. 1019 [1897]. *See* Chicago R. I. & P. R. *v.* Moffit, 75 Ill. 524 [1874].

[6] Larimer County Ditch Co. *v.* Zimmerman (Colo. App.), 34 Pac. Rep. 1111; Meyer *v.* Harris (N. J.), 38 Atl. Rep. 690 [1897].

[7] Erie *v.* Erie Canal Co., 59 Pa. St. 174.

[8] Webb *v.* Laird (Vt.), 7 Atl. Rep. 465 [1887].

[9] Trudeau *v.* Field (Vt.), 38 Atl. Rep. 162 [1897].

If a dam became choked or obstructed with ice, the proprietor may be held liable for damages occasioned by such obstruction.[1]

89. Liability for Injuries to Dam.—Where a person has maintained a dam for over fifty years on a navigable river used for the floatage of logs, persons injuring the dam, by reason of their negligence in handling the logs, are liable to the owner of the dam for the injuries.[2] The mill-owner cannot recover for damages to his mill property caused by logs floated over his dam without negligence, where the injuries could have been avoided by his building an apron on the dam.[3]

When one has maintained a dam at a certain height,[4] or has flowed certain lands without interruption,[5] or has diverted certain waters by an aqueduct over defendant's lands,[6] for a period of years equal to the statutory limit, he will have a good defense to a suit to prevent a continuance of such acts or for damages resulting therefrom.

90. Injuries Due to Floods that might have been Expected, Foreseen, and Guarded Against.—The flood which caused the damage must have been an extraordinary one which could not reasonably have been expected and foreseen, or it must have been the result of unforeseen causes, or the proprietor of the dam causing it will be liable.[7]

An extraordinary rainfall or an unusual spring freshet which might be expected to occur once in a series of years, and which persons of ordinary prudence and discretion would not think of guarding against, was held not such a flood as a city was required to guard against.[8] An overflow caused by the spontaneous growth of a particular kind of grass in a dam was held not to make the dam-owner liable for injuries resulting.[9] The flood or freshet need not necessarily have been unprecedented; as where three floods come in rapid succession. The question is whether the flood which caused the damage was extraordinary and such as would not reasonably have been expected or anticipated.[10] This question as to whether the flood or freshet was of such unusual or extraordinary character as to excuse the dam-owner is for the jury under proper instruction.[11]

If the obstruction of a stream by a dam is unlawful in the first instance, the owner will be liable in damages without regard to whether it is reasonable or whether provisions were made against freshets and floods.[12]

[1] Cowles *v.* Kidder, 24 N. H. 364; Weaver *v.* Miss. Boom Co., 28 Minn. 534.

[2] James *v.* Carter (Ky.), 29 S. W. Rep. 19.

[3] Huff *v.* Kentucky Lumber Co. (Ky.), 45 S. W. Rep. 84 [1898].

[4] Ballard *v.* Struckman (Ill.), 14 N. E. Rep. 682 [1888]. *See* A. P. Cook Co. *v.* Beard (Mich.), 65 N. W. Rep. 518.

[5] Gleason *v.* Tuttle, 46 Me. 288 [1858].

[6] Emerson *v.* Bergin (Cal.), 18 Pac. Rep. 264 [1888].

[7] China *v.* Southwick, 12 Me. 238; Pixley *v.* Clark, 35 N. Y. 520; Cobb *v.* Smith, 38 Wis. 21; Sabine *v.* Johnson, 35 Wis. 185; Proctor *v.* Jennings, 6 Nev. 83.

[8] Alexander *v.* Milwaukee, 16 Wis. 247.

[9] Knoll *v.* Light, 76 Pa. St. 268.

[10] Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445. *And see* People *v.* Utica Cement Co., 22 Ill. App. 159.

[11] Gray *v.* Harris, 107 Mass. 492; Borchardt *v.* Wausaw B. Co., 54 Wis. 107; Higgins *v.* New York, etc., R. Co. (Sup.), 29 N. Y. Supp. 563.

[12] Hartshorn *v.* Chaddock (Super. Ct.), 40 N. Y. St. Rep. 953.

CHAPTER VIII.

DIVERSION AND OBSTRUCTION OF WATERS. STREAMS.

101. Diversion of Watercourses.—A riparian owner may change the course of a stream flowing through his land if he returns it to the original channel at the point where it leaves his land, and does not unreasonably diminish the flow of the stream.[1] A stream may be diverted for the purpose of irrigating the lands of the owner if there be no excessive diminution of the waters.[2] The diversion of a moderate quantity of water for the use of steam-engines may be made without liability to the lower riparian owner unless he has suffered perceptible damage.[3]

One who has acquired a right to divert the waters of a stream may change the point of diversion and the place of use without losing his right of priority, when the rights of others are not injuriously affected.[4] To divert the waters of a stream into one's own land without license, grant, or lawful right is a nuisance.[5] The construction of a sewer in the bed of a stream and the discharge of the stream through the sewer has been held a taking of the water of the stream, even though the water is returned to the natural channel.[6]

102. The Quantity Must Not be Materially Diminished.—Water may not be diverted so as to lessen the supply to other riparian owners to which they are entitled.[7]

One who digs a ditch which diverts water from a stream, to the damage of the owner of a pond fed by such stream, is liable for the loss occasioned thereby even after he has ceased to work on the ditch, since the effect of the wrongful act is continuous.[8] The diversion of water from a creek by a rail-

[1] Garwood *v.* N. Y. Cent. R. Co., 83 N. Y. 400; Pettibone *v.* Smith, 37 Mich. 579; Creighton *v.* Kaweah Canal Co., 67 Cal. 221; Moore *v.* Clear Lake W. (Cal.), 5 Pac. Rep. 494 [1885]; Earl of S. *v.* Gt. N. R. Co., L. R. 10 Ch. Div. 707.

[2] Embry *v.* Owen, 6 Exch. 353.

[3] Elliott *v.* Fitchburg R. Co. (Mass.), 10 Cush. 191.

[4] Fuller *v.* Swan R. P. Min. Co. (Colo.), 19 Pac. Rep. 836 [1889].

[5] Vernum *v.* Wheeler, 35 Hun (N. Y.) 53; Porter *v.* Durham, 74 N. C. 767; Williams *v.* Fulmer (Pa. Sup.), 25 Atl. Rep. 103; Learned *v.* Castle, 78 Cal. 454; Hocutt *v.* Wilmington & W. R. Co. (N. C.), 32 S. E. Rep. 681 [1899].

[6] Worcester Gas Lt. Co. *v.* Co. Comm'rs, 138 Mass. 289 [1885]. *See* Schoen *v.* Kansas City, 65 Mo. App. 134.

[7] 28 Amer. & Eng. Ency. Law 979, *and cases cited.*

[8] Covert *v.* Valentine (Sup.), 21 N. Y. Supp. 219.

road company and its conveyance in pipes to reservoirs for the supply of their locomotives, and in such a quantity as to perceptibly reduce the volume of the stream and diminish the grinding power of a mill, will render the railroad company liable to damages and to an injunction to stop such diversion.[1] A diversion that is not continuous, but for certain periods, may be restrained if it be unlawful.[2] If a person conduct as much water to the stream as he has taken therefrom, it seems that he will not be restrained from so doing.[3] If there are two mill-owners upon opposite sides of a stream, and one has the exclusive right to the whole of the water, it seems that when there is not enough for both mills he has not a legal right to erect a permanent dam to turn all the water to his own mill, but must rely on his legal remedies if his rights are infringed by the opposite mill-owner.[4]

103. Obstruction of Outlet to Pond.—If the owner of the outlet of a pond or lake has allowed it to become obstructed so as to raise the water on the land of another, the latter may not cut a drain to discharge such water, but should remove the obstruction to the original outlet.[5] If, however, a diversion has resulted from natural causes, a lower riparian owner has no right to go upon the land of an upper proprietor to restore a stream to its original channel independent of a contract or without a license.[6] A ditch may *not* be dug to drain away waters of a lake, in times of high water, to the injury of the owner of the water-power at the natural outlet of the lake.[7] *

104. Diversion Not Excused by Fact that Sufficient Water Remains.—It is not necessary that the diversion should cause actual injury to the plaintiff. It is an infringement of his right, and damages may be recovered because of acts of the defendant, for he could after long user furnish evidence which would destroy the plaintiff's rights.[8] A wrongful diversion will be restrained even though sufficient water is left after the use for all purposes to which the lower riparian owner puts the stream at the time of the wrongful acts.[9] Any diversion of waters to which the party making the diversion is not justly and lawfully entitled will be restrained. If the diversion be wrongful, it is a continuing injury to other persons, and successive actions may be brought in the courts as long as the diversion is continued.[10]

[1] Garwood *v.* N. Y. Cent. R. Co., 83 N. Y. 400.
[2] Carron *v.* Wood, 10 Mont. 500.
[3] Wilcox *v.* Hausch, 64 Cal. 461.
[4] Curtis *v.* Jackson, 13 Mass. 507.
[5] Mohr *v.* Gault, 10 Wis. 513.
[6] Wholey *v.* Caldwell (Cal.), 41 Pac. Rep. 31.
[7] Bennett *v.* Murtaugh, 20 Minn. 151. *See* Underground Waters, 27 Amer. & Eng. Ency. Law 423.
[8] 28 Amer. & Eng. Ency. Law 981; Rigney *v.* Tacoma Lt. & W. Co. (Wash.). 38 Pac. Rep. 147; New York R. Co. *v.* Rothery (N. Y. App.), 30 N. E. Rep. 841; Southern M. Co. *v.* Darnell (Ga.), 21 S. E. Rep. 531; Chatfield *v.* Wilson, 27 Vt. 670 [1854].
[9] Gilzinger *v.* Saugerties W. Co. (Sup.), 49 N. Y. St. Rep. 308; Miller *v.* Windsor W. Co. (Pa. Sup.), 23 Atl. Rep. 1132; *semble*, Gallagher *v.* Kingston W. Co. (N. Y.), 25 App. Div. 82. *But see* Pine *v.* New York (C. C.), 76 Fed. Rep. 418.
[10] Bare *v.* Hoffman, 79 Pa. St. 71; Gallagher *v.* Kingston W. Co, (N. Y.), 25 App. Div. 82 [1898]. *But see* Pine *v.* New York (C. C.), 76 Fed. Rep. 418.

* *See* Secs. 251–280, *infra*.

In arid districts where irrigation laws have been passed, under the principles of prior appropriation the right to water flowing in public streams may be acquired by actual appropriation for a beneficial use to an extent necessary for the purposes for which the appropriation is made, when reasonably used with reference to the general condition of the country and the necessities of the community; and the surplus may be appropriated, subject to the rights of prior appropriators.[1] *

105. Diversion of Stream into New Channel.—Within the limits of one's own land the course of the stream may be changed provided it be restored practically undiminished to the original channel before leaving his premises.[2] The failure to restore the waters to their original channel constitutes an unlawful diversion.[3] It is no excuse that the unauthorized interference of a stranger rendered the means provided for restoring the water unavailable, though otherwise adequate.[4] A person entitled to the use of water may change the place of diversion, the place where it is used, or the use to which it is applied, if others are not injured by such change[5] and no more than he is entitled to is diverted.[6]

One who makes a new channel for a stream impliedly authorizes the public to use the new channel as they had previously used the original channel. This is so if he has obstructed the old channel; but if the obstruction of the old channel has arisen not from the making of the new one, but from the consequent stoppage of the flow of the stream at a distant point, the public acquires no right to use the new channel.[7] In making a new channel for a stream, reasonable care and foresight must be exercised. If this has been done, there will be no liabilities for injuries resulting from unforeseen causes.[8]

In the matter of obstruction the new channel will be governed by the same rules as a natural watercourse.[9] Care must be taken to make the new channel adequate to carry off the waters,[10] even though the change is made under power conferred by charter of the city.[11] At least it must be equally adequate to carry off the flow at all times and in all cases that may be

[1] Union Mill & Min. Co. *v.* Dangberg (C. C. D. Nev.), 81 Fed. Rep. 73, *citing many cases.*

[2] Mo. Pac. Ry. Co. *v.* Keys (Kan.), 40 Pac. Rep. 275; Gould *v.* Eaton (Cal.), 49 Pac. Rep. 577; 28 Amer. & Eng. Ency. Law 982.

[3] Woodworth *v.* Genesee P. Co. (N. Y.), 18 App. Div. 510.

[4] Stein *v.* Burden, 29 Ala. 127.

[5] Ramelli *v.* Irish (Cal.), 31 Pac. Rep. 41.

[6] Smith *v.* Corbit (Cal.), 48 Pac. Rep. 725. *But see* Hague *v.* Nephi Irr. Co. (Utah), 52 Pac. Rep. 765.

[7] Dwinel *v.* Barnard, 28 Me. 554.

[8] Hargraves *v.* Kimberly, 26 W. Va. 787; Brown *v.* Best, 1 Wils. 174.

[9] Mo. Pac. Ry. Co. *v.* Keys (Kan. Supp.), 40 Pac. Rep. 275. *And see* Sweeney *v.* Mont. Cent. Ry. Co. (Mont.), 47 Pac. Rep. 791.

[10] Tucker *v.* Salem Mills (Oreg.), 16 Pac. Rep. 426 [1888].

[11] Barus *v.* Hannibal, 71 Mo. 449; Imler *v.* Springfield, 55 Mo. 119; Wigmann *v.* Jefferson, 61 Mo. 55; Carl *v.* W. Aberdeen Ld. & Imp. Co. (Wash.), 43 Pac. Rep. 890.

* *See* Secs. 71–80, *supra.*

reasonably anticipated. The person diverting the stream is liable for injuries caused by any defects in regard to these requirements.[1]

A landowner is not entitled to recover damages from overflow, under an allegation that a canal was too small to carry off the waters accumulated "in time of heavy rains and freshets," where it is not shown that the former bed of the river was adequate for that purpose.[2]

The owner of a piece of land through which a stream of water runs may change the course of the stream on his own land to any extent, if he does not thereby diminish, in any material degree, the beneficial use of the stream to other proprietors either above or below. Where such diversion affects those above or below unfavorably, it requires fifteen years (in Vermont) to give the right to continue the stream in the new channel. If the diversion affects other proprietors favorably, and the party on whose land the diversion is made acquiesces in the stream running in the new channel for so long a time that new rights may be presumed to have accrued, or have in fact accrued, in faith of the new state of the stream, the party is bound by such acquiescence, and cannot return the stream to its former channel.[3] *

Evidence of diversions by persons other than defendant is inadmissible, it not appearing whether such diversions were lawful or with plaintiff's consent.[4]

106. Excavating and Deepening the Channel of a Stream.—A riparian owner may excavate the bed of a stream, although he thereby increases the quantity of water. This is often done to increase the flow of springs which are the sources of creeks.[5] One must have more than a prescriptive right to the waters, to be entitled to so excavate.[6] Care must be taken not to injure the property of other riparian owners, nor their rights in the stream.[7] One may not change the natural course of a stream to protect his meadow, where such change will so increase the current of the stream as to damage the mill-dam of the owner of the lower land by washing the banks and filling the dam with sediment.[7] To protect one's own land, it has been held that one might, as against the proprietors on the opposite side of the river, change the channel and mouth of the creek upon his own land, if in doing so he exercised reasonable care and caution not to injure others. This could not be done if it increased the danger of overflow on the opposite side of the stream.[8]

107. New Channel Fixed by Prescription.—If the water has flowed in a new channel for the period of twenty-one years, i.e., for the period of limitations, it cannot be diverted and returned to its old course to the injury of those who have acquired prescriptive rights in the stream.[9] Where water has

[1] Fletcher *v.* Smith, L. R. 7 Exch. 305.
[2] Powers *v.* St. Louis Ry. Co., 71 Mo. App. 540 [1897].
[3] Ford *v.* Whitlock, 27 Vt. 265 [1855].
[4] Heliborn *v.* Kings River & Faco Co. (Kans.), 17 Pac. Rep. 933 [1888].
[5] Waffle *v.* Porter (N.Y.), 61 Barb. 130.
[6] Colman *v.* State (N. Y. App.), 31 N. E. Rep. 902.
[7] Kay *v.* Kirk, 76 Md. 41, 24 Atl. Rep. 326.
[8] Railroad Co. *v.* Carr, 38 Ohio St. 448.
[9] Leidlein *v.* Meyer (Mich.), 55 N. W. Rep. 367; Mathewson *v.* Hoffman, 77

* *See* Secs. 107 and 661–670, *infra*.

flowed for twenty-one years from springs on defendant's land through a natural channel to plaintiff's land, the former has no right to divert it.[1]

No prescriptive right to the use of the water of a stream can be acquired by one riparian proprietor, as against another, by a use of the water at times when such use does not interfere with the latter's use of the water, and when, as often as there is interference, the latter has protested and sought to prevent the use.[2]

Parties failing to connect themselves by title with prior occupants who had appropriated the water of a stream for the cultivation of the land cannot avail themselves of such prior appropriation of the water. Their own appropriation of the water must be treated as the inception of their rights.[2] The use of the water must have been hostile and not under a license.[3]

The fact that one who owns and controls a dam and canal for the purpose of navigation diverts an inconsiderable amount of water from the stream to create a water-power is not *per se* notice of an adverse claim of right to so use said water.[4] The acquiescence of a riparian owner does not give to a person diverting water to a useful purpose a prescriptive right therein against the owner by operation of the statute of limitations.[5] The right of a riparian owner to put to a legitimate use the water of a stream flowing through or along his land is not lost by nonuser.[5]

A right acquired by the state, through adverse user, to divert water from a river into a stream flowing through plaintiff's land gives the state no title by adverse possession to land under the stream, and hence no right to broaden and deepen its bed.[6]

If the new channel was caused by sudden floods, and has continued in that course for the full period of prescription, it cannot be restored to its old channel.[7] A mill-owner may prevent the restoration of a stream to its original channel if he has acquired by prescription the right to discharge the water from his mill into an artificial channel.[8]

If water has been conducted to a mill-race, but has occasionally been turned into its old channel in order that the race might be cleaned and repaired, a recent purchaser of land cannot complain if the water is turned back into its original channel permanently.[9]

Oreg. 420; Woodbury *v.* Short, 17 Vt. 387; Eshleman *v.* Martic (Pa. Sup.), 25 Atl. Rep. 178; Tucker *v.* Salem F. Mills (Oreg.), 16 Pac. Rep. 426 [1888].

[1] Adam *v.* Moll, 6 Pa. Super. Ct. 380 [1898]; Eshleman *v.* Martic (Pa. Sup.), 25 Atl. Rep. 178; Mastenbrook *v.* Alger (Mich.), 68 N. W. Rep. 213; Taylor *v.* Blake (N. H.), 10 Atl. 698 [1887]; Huston *v.* Bybee (Oreg.), 20 Pac. Rep. 51 [1889]; Knights of P. *v.* Leadbeter (Pa.), 39 W. N. Cas. 188.

[2] Union Mill & Mining Co *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[3] Huston *v.* Bybee (Oreg.), 20 Pac. Rep. 51 [1889].

[4] Green Bay Canal Co. *v.* Kaukauna W. P. Co. (Wis.), 61 N. W. Rep. 1121.

[5] Hargrave *v.* Cook (Cal.), 41 Pac. Rep. 18.

[6] Colman *v.* State (N. Y. App.), 31 N. E. Rep. 902; Terre Haute & I. R. Co. *v.* Zehner (Ind. App.), 42 N. E. Rep. 756.

[7] Woodbury *v.* Short, 17 Vt. 387.

[8] Delaney *v.* Boston (Del.), 3 Harr. 489.

[9] Peter *v.* Caswell, 38 Ohio St. 518.

108. Riparian Owners whose Rights are Not Affected Cannot Complain.—One whose rights are not in any way affected by such wrongful diversion may not complain of the wrongful act. The owner of land upon another stream into which the stream diverted occasionally empties has no just cause to complain unless he shows that the quantity that would have emptied into his watercourse has been lessened.[1] An upper riparian owner cannot complain about what a neighbor lower down on the stream is doing if it does not affect him injuriously.[2] It is no excuse for the diversion of the waters of a lake that the plaintiff supplied water by certain acts, and the defendant will be supplied with sufficient water to furnish a more uniform supply for his mill than he had previously had from the lake.[3]

A riparian owner is not estopped from maintaining an action against a water company for wrongfully diverting water from a stream because he is a water-taker from the company.[4]

It has been held that if the uninterrupted flow of a stream would be insufficient to afford one, having rights in its waters, any beneficial use of it, he is not entitled to interfere with the use of such waters by others.[5]

The owner of land who has appropriated the waters of a stream for irrigation purposes cannot enjoin the diversion of waters from the stream by the owner of land fifteen miles above him, which water cannot reach plaintiff's land because of the drying up of the stream between his land and defendant's, on the ground that the volume of water diverted might, in the event of an unusual flow of water, cause some to flow to plaintiff's land.[6]

109. Mode of Diverting Waters.—It does not matter by what methods waters are diverted, whether by damming or by erecting a bulwark or pier either in a stream or upon the banks of a stream. A bulkhead erected upon the banks of a stream, in times of flood, which has the effect of diverting the stream from its accustomed course, and causing an unusual overflow of the lands of neighbors, is a nuisance.[7]

110. Diversion of Waters by Percolation or Subterranean Channels.—Any diversion of the watercourse, by whatever act or means, is equally wrongful whether it be the diverting of the waters of a stream or of a spring which is the source of a running stream.[8] A riparian proprietor cannot dam a stream so that the water accumulates in an artificial pond and by percolation

[1] Creighton *v.* Raweah C. Co., 67 Cal. 221; Platte Val. Irr. Co. *v.* Buckers (Colo.), 53 Pac. Rep. 334 [1898].

[2] Larimer & W. Res. Co. *v.* Water S. & S. Co. (Colo. App.), 42 Pac. Rep. 1020.

[3] Smith *v.* Rochester, 104 N. Y. 674.

[4] Chace *v.* Warsaw W. Co. (Sup.), 29 N. Y. Supp. 729.

[5] Union M. & M. Co. *v.* Dangberg (C. C.), 81 Fed. Rep. 73.

[6] Raymond *v.* Wimsette (Mont.), 31 Pac. Rep. 537.

[7] Lord *v.* Meadville W. Co., 135 Pa. St. 122; Colrick *v.* Swineburne, 105 N. Y. 503; Menzies *v.* Beedlebane, 2 Wils. 235; Ewing *v.* Colquhoun, L. R. 2 App. Cas. 839; Bickett *v.* Morris, 1 H. L. Cas. 47.

[8] Boynton *v.* Gilman, 53 Vt. 17; Strait *v.* Brown, 16 Nev. 317; Springfield W.-w. Co. *v.* Jenkins, 1 Mo. App. Repr. 699; Leavenworth *v.* Prospect R. W. Co. (Com. Pl.), 8 Kulp 310; Colrick *v.* Swinbure (N. Y.), 12 N. E. Rep. 427 [1887].

and evaporation is diminished in quantity so as to deprive the lower proprietor of a reasonable amount of water.[1] It is wrongful to draw off the waters of a stream by subterranean percolations. The waters of the stream cannot be diverted from their natural course, except for the natural wants of a riparian owner.[2] Springs that are the source of a creek or brook may not be diverted to unknown subterranean channels though they do find their way back to the creek.[3]

A grant of the waters of a designated spring does not carry with it the right to excavate and so get water from neighboring springs to the full capacity of a pipe laid, but only the right to take such water as may flow from the spring designated.[4]

In some states the right to the use of a spring depends upon discovery and an express declaration of location and a claim of ownership of the spring and the waters flowing from it.[5] An appropriator of water in United States public lands is entitled to the use of the same, as against one who subsequently acquires title to the land from the government.[6]

111. Measure of Damages for Diversion of Waters.—As before stated, a riparian owner may recover nominal damages for the invasion of his rights even though he sustained no actual injury. If a diversion of water results in actual injury, the measure of damages will be estimated by the actual loss which has been sustained and the expense he has been put to by reason of the diversion of the flow and the use of the water during the time of the diversion.[7]

It has been held that damages for diversion of a stream from a manufactory was the diminished rental value of the works during the period of diversion.[8] Another case held that the measure of damages was the actual value of the use of the water during the time that it was diverted.[9]

In arriving at an estimate of the value of certain water-powers, of which the owner was deprived by reason of the appropriation of the stream as a supply for a neighboring town, the stream being torrential, the commissioners properly estimated its average capacity, exclusive of seasons of flood and

[1] White *v.* East Lake L. Co. (Ga.), 23 S. E. Rep. 393; Mitchell *v.* Bain (Ind.), 42 N. E. Rep. 230; Bruening *v.* Dorr (Colo. Sup.), 47 Pac. Rep. 290; Hopper *v.* Hopper (Pa. Sup.), 23 Atl. Rep. 321. *See* Sparlin *v.* Gotcher (Or.), 31 Pac. Rep. 399.

[2] Boynton *v.* Gilman, 53 Vt. 17; Hopper *v.* Hopper (Pa. Sup.), 23 Atl. Rep. 321.

[3] Strait *v.* Brown, 16 Nev. 317; Strickler *v.* Colorado Spgs. (Colo. Sup.), 26 Pac. Rep. 313. *But see* Leonard *v.* Shatzer (Mont.), 28 Pac. Rep. 457.

[4] Furner *v.* Seabury (N. Y. App.), 31 N. E. Rep. 1004; 69 N. Y. 16 *distinguished*, 13 N. Y. Supp. 12 *reversed*.

[5] Silver Peak Mines *v.* Valcada (C. C.), 79 Fed. Rep. 886; Taylor *v.* Abbott (Cal.), 37 Pac. Rep. 408. *And see* Malad Val. Irr. Co. *v.* Campbell (Idaho), 18 Pac. Rep. 52 [1888].

[6] Judkins *v.* Elliott (Cal.), 12 Pac. Rep. 116 [1887].

[7] Merritt *v.* Brinkerhoff, 17 Johns. (N. Y.) 306; Platt *v.* Johnson, 15 Johns. (N. Y.) 213; Hart *v.* Evans, 8 Pa. St. 13.

[8] Colrick *v.* Swinburne, 105 N. Y. 503. *See* Honsee *v.* Hammond (N. Y.), 39 Barb. 89.

[9] Pollitt *v.* Long (N. Y.), 58 Barb. 20.

freshet.[1] For diverting the waters of springs that fed a fish-pond, plaintiff recovered only what he lost in the diminished value of the use of the pond, without reference to his particular business or the special use to which the fish were applied.[2]

Under a conveyance of land with the right to use the water from another tract, evidence of the value of plaintiff's lot at the time of the conveyance, without such water right, is not admissible to prove the damages caused by defendant's subsequent interference with the easement.[2] Towns taking water to the injury of mill-owners cannot show, in reduction of damages, that a certain amount of the water would necessarily be returned after use by percolation to the river below, and there become available for mill purposes.[3]

In an action to enjoin an upper riparian proprietor from diverting waters from a creek, evidence that persons other than defendant have also diverted water from the stream is admissible on the question of the amount of damages.[4]

112. Obstruction by Bridges, Culverts, and Embankments.—Streams are often obstructed by the owners of land, or by companies which own rights of ways which traverse the land, to the detriment and injury of riparian owners both above and below the structure. There can be no doubt but that a bridge or structure may be built over or under a stream if it be so constructed and maintained that it does not change the natural flow of the stream and interfere with the rights of other riparian owners, and of the public in navigable streams.[5] If the structure does interfere with the rights of riparian owners, the one causing the injury will be liable in damages.[6]

If the abutments of a bridge set back the waters of a stream upon the land of others, the persons owning or building the bridge will be liable in damages. It does not matter that the abutments of an old bridge, immediately above the site of the present structure, extend equally far into the stream.[7]

A railroad company that maintains a dam on its right of way over a waterway, which constitutes a nuisance in causing the water to overflow adjacent land, is liable though the dam was originally constructed by the county under legislative authority.[8]*

113. Diversions Made to Lessen the Cost of Structures.—A person or company erecting a bridge may, if it seems necessary, divert the watercourse

[1] *In re* Tracy (Sup.), 16 N. Y. Supp. 606.
[2] Spencer *v.* Kilmer (N. Y. App.), 45 N. E. Rep. 865.
[3] Proprietors *v.* Inhabitants (Mass.), 32 N. E. Rep. 153.
[4] Gould *v.* Stafford (Cal.), 18 Pac. Rep. 879 [1888].
[5] 28 Amer. & Eng. Ency. Law 966.
[6] Bryant *v.* Bigelow C. Co., 131 Mass. 491; Fick *v.* Penna. R. Co., 157 Pa. St. 622; Ohio & M. Ry. Co. *v.* Thillman (Ill.), 32 N. E. Rep. 529; Smith *v.* Phila., etc., R. Co., 57 Fed. Rep. 903.
[7] Gillespie *v.* Forest (N. Y.), 18 Hun 110; Masonic Temp. Assn. *v.* Banks (Va.), 27 S. E. Rep. 490.
[8] Payne *v.* Kansas City R. Co. (Mo. Sup.), 20 S. W. Rep. 322.

* *See* Sec. 719 *infra*, Obstructions of Streets by Bridges and Viaducts.

to a reasonable extent from its natural channel if he (it) makes such channels, bridges, culverts, or drains as may be necessary to carry off the water in the direction which they may give it. He (it) is bound as part of his (its) public duty to keep such public channel, bridge, or culvert in suitable and sufficient repair to carry out the purpose for which it was made.[1] The company may not be required to go to any unreasonable expense, as where a stream is a broad, shallow watercourse which may be reduced in width and deepened so as to carry off the water. The company may do so instead of bridging the entire original width. A natural bed in a watercourse may be changed where the bottom or substratum is of such a character that it makes it very difficult and expensive to build the foundations, care being taken that the new channel should be equally beneficial with the old one.[2] Railroad and other companies constructing roads across streams are required to exercise the same care in erecting bridges, viaducts, and culverts.[3]

114. Structures must Provide for Ordinary Floods and Freshets.—A bridge, aqueduct, or culvert must be so constructed that it carries off the water of the stream over which it is built under any circumstances likely to occur in the usual course of nature, and including such heavy floods and freshets as are ordinarily expected, although not of common occurrence.[4] It is frequently held that a company is not liable for damages resulting from its culverts or bridges, being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls.[5]

If a larger span in the bridge would have obviated the flooding of plaintiff's mill property, he is entitled to recover for the injury, though such flooding would not have occurred if he had not raised the dam or built the wall. The company erecting the structure must provide for existing circumstances.[6] Damages from the diversion of streams by such structures are not, it seems, covered by the general laws providing for the acquirement of the right of way.[7] If, to save expense in the construction of a railroad, the

[1] Koch *v.* Del., L. & W. R. Co. (N. J. Sup.), 24 Atl. Rep. 442.

[2] Rowe *v.* Granite Bdge. Co. (Mass.), 21 Pick. 344.

[3] 28 Amer. & Eng. Ency. Law 967.

[4] Fick *v.* Penna. R. Co. (Pa. Sup.), 27 Atl. Rep. 783; Norfolk & W. R. Co. *v.* Carter (Va.), 22 S. E. Rep. 517; Cleveland, etc., Ry. Co. *v.* Nuttall, 59 Ill. App. 639; St. Louis, etc., R. Co. *v.* Ellis, 58 Ill. App. 110; Riddle's Ex'rs *v.* Delaware Co. (Pa. Sup.), 27 Atl. Rep. 569; Wallace *v.* Columbia & G. R. Co. (S. C.), 16 S. E. Rep. 35; N. Y. C. & St. L. R. Co. *v.* Hamlet Hay Co. (Ind.), 47 N. E. Rep. 1060 [1897]; Fleming *v.* Wilmington, etc., R. Co. (N. C.), 20 S. E. Rep. 714; Ohio & M. Ry. Co. *v.* Thillman (Ill.), 32 N. E. Rep. 529; Bierer *v.* Hurst (Pa. Sup.), 26 Atl. Rep. 742; Booker *v.* McBride (Tex. Civ. App.), 40 S. W. Rep. 1031; Phila., etc., R. Co. *v.* Davis (Md.), 11 Atl. Rep. 822 [1888].

[5] Emery *v.* Raleigh, etc., R. Co., 102 N. C. 209; Knight *v.* Albemarle, etc., R. Co., 111 N. C. 80; Shahan *v.* Alabama, etc., R. Co. (Ala.), 22 So. Rep. 449; Sprague *v.* Worcester (Mass.), 13 Gray 193; Fick *v.* Penna. R. Co. (Pa. Sup.), 27 Atl. Rep. 783; Orvis *v.* Elmira, etc., R. Co. (Sup.), 45 N. Y. Supp. 367. *And see* Hunter *v.* Pelham Mills (S. C.), 29 S. E. Rep. 727 [1898], where the negligence of the owner and act of God were coincident.

[6] Riddle's Ex'rs *v.* Delaware Co. (Pa.), 27 Atl. Rep. 569.

[7] Ward *v.* Albemarle R. Co. (N. C.), 16 S. E. Rep. 921.

company diverts a stream from its natural course under a bridge over the channel of another stream, it will be liable in damages for overflows both above and below the bridge caused by such diversion, even though the waterway under the bridge was sufficient for the passage of the waters in times of freshets.[1]

115. What was an Extraordinary Flood Is a Question for the Jury.— A charge that if extraordinary overflows had occurred within the memory of man prior to the overflow in question, the recurrence thereof should have been anticipated and the probable danger provided for, is error, for it is the province of the jury to determine whether or not, under the particular circumstances of the case, defendant should have anticipated the recurrence of such floods as had previously occurred.[2] Whether a flood was extraordinary on a particular stream is a question for the jury, there being evidence that within forty-two years there had occurred four other floods of almost equal force and volume of water.[3] The jury must determine whether a bridge has an opening for the flow of water of sufficient capacity to meet all the ordinary exigencies of the climate and the situation of the stream, and also such extraordinary exigencies as experience would lead the residents in that vicinity to believe might sometimes occur.[4] It is for the jury to say whether an owner has, by the erection of a dam or other structure, materially diminished the natural flow of water.[5] In determining what is an extraordinary flood on a particular stream, the jury must consider what should be expected in such stream from its character, the adjacent territory, and the fact that there had been several previous floods of equal force and volume.[6]

If the flood complained of could have been avoided, the company will not be relieved from damages, though it has the right "to change the watercourse and take water."[7]

The act of a landowner in diverting a stream of water to a new channel when a railroad crossing has obstructed the flow of the water does not lose his right to have the water flow in the old channel, unless it be shown that he intended permanently to abandon it, and this question of intention is a question for the jury.[8] If a bridge be erected and its abutments so placed as

[1] Adams *v.* Durham & N. R. Co. (N. C.), 14 S. E. Rep. 857; Koch *v.* Del. L. & W. R. Co. (N. J. Sup.), 24 Atl. Rep. 442.

[2] Gulf, C. & S. F. Ry. Co. *v.* Calhoun (Tex.), 24 S. W. Rep. 362; Hunter *v.* Pelham Mills (S. C.), 29 S. E. Rep. 727 [1898].

[3] Brown *v.* Pine Creek Ry. Co, 183 Pa. St. 38, the Johnstown Flood of 1889; Ohio & M. R. Co. *v.* Thillman (Ill. Sup.), 32 N. E. Rep. 529, two such floods in five years; Hunter *v.* Pelham Mills (S. C.), 29 S. E. Rep. 727 [1898].

[4] Higgins *v.* New York, L. E. & W. R. Co. (Sup.), 29 N. Y. Supp. 563; Illinois Cent. R. Co. *v.* Wilbourn (Miss.), 21 So. Rep. 1.

[5] N. Y. Rubber Co. *v.* Rothery (Sup.), 23 N. Y. Supp. 247.

[6] Brown *v.* Pine Creek Ry. Co., 182 Pa. St. 38. *See* Hunter *v.* Pelham Mills (S. C.), 29 S. E. Rep. 727 [1898].

[7] St. Louis, etc., R. Co. *v.* Harris, 47 Ark. 340.

[8] Mississippi Cent. R. Co. *v.* Mason, 51 Miss. 234.

to discharge the water in times of flood, the owner of the bridge is not liable for the obstruction of surface-water flowing on his land.[1]

116. Liability for Obstruction During Erection Authorized by Law.— One who of his own authority interferes with a watercourse, even upon his own land, does so at his peril as respects other riparian owners above or below; but when one acts under the authority of the law, as for the purpose of constructing public works upon making compensation, he has the sanction of the state in what he does, and unless he commits a fault in the manner of doing it he is completely justified. For obstructing a stream he is then liable only for such injury as results from the want of due skill and care in so arranging necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream.[2] If the erection of a bridge by a railroad company is duly authorized by law, the company is not responsible for damages arising from the temporary obstruction of the stream, or by the construction of a temporary stationary bridge, or by any unavoidable delay in the completion of the bridge.[3] The obstruction of a navigable stream while building the bridge over it is not in violation of the law, where such obstruction extended over no more of the stream at any one time, and was continued for no longer period, than was absolutely required.[4]

Where it is necessary for a commissioner of highways, in the discharge of his public duty, to shut off the water from a mill in order to repair a culvert forming part of an artificial watercourse or tailrace passing under a public street, and the repairs are prosecuted with diligence and reasonable care, the commissioner is not liable for damages for the loss of power to the mill pending such repairs.[5] Damages for permanent injury cannot be awarded for a nuisance created by the temporary cessation of the work of converting a creek into a sewer, caused by litigation over city bonds designed for its payment.[6] Whether the extent and duration of the obstruction renders such obstruction unlawful is for the jury.[7]

Where a railroad company, empowered by its charter to erect and maintain a bridge "so as not unreasonably to obstruct navigation," erected a temporary bridge which interfered with navigation, but arranged to transfer all freight without extra charge to shippers and public convenience was in fact subserved by the plan pursued by the railroad company, this was held not an unreasonable obstruction of navigation, and a shipper is not entitled to recover the extra freight paid for transportation by rail.[8]

When defendant obstructed a stream for the purpose of doing certain work,

[1] Conhocton S. R. Co. *v.* Buffalo, etc. Co. (N. Y.), 3 Hun 523.
[2] Bellinger *v.* N. Y. Central R. Co., 23 N. Y. 42 [1861].
[3] Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970.
[4] Cantwell *v.* Knoxville, C. G. & L. R. Co. (Tenn.), 18 S. W. Rep. 271.
[5] Kerr *v.* Joslin (Sup.), 20 N. Y. Supp. 929.
[6] Schoen *v.* Kansas City, 65 Mo. App. 134
[7] Cantwell *v.* Knoxville, C. G. & L. R. Co. (Tenn.), 18 S. W. Rep. 271.
[8] Rhea *v.* Newport R. Co. (Cir. Ct.), 50 Fed. Rep. 16.

under contract with a city, which would require from four days to three months to do, and which might be accomplished at a little added expense in another way without obstructing the stream, and an overflow filled cellars of a building with offensive and filthy water, productive of disease to the tenants in the building, it was held that the further obstruction of the stream might be enjoined, though at his own expense the plaintiff might possibly have warded off disease.[1]

It is error for the court to charge the jury that "plaintiff had the right to have the waters, whether rain-water or spring-water, flow as they naturally would have flowed without any obstruction by the railroad," since the company is not liable for an obstruction incident to a proper construction and use of its property.[2]

117. Stream Contracted by Structure and Consequent Overflow.—Contracting a natural stream between two abutments from 150 feet apart to 92 feet apart, so that the surface of the water up-stream at a mill-dam is raised five feet and the premises are injured in a freshet, was held an actionable nuisance.[3] If, however, the bridge were constructed so that it would take care of all waters except upon the occasion of an extraordinary flood, no liability would have attached.[4]

The same law is applicable to the construction and maintenance of bridges by municipal corporations.[5] Bridges must be so constructed and maintained as not to interfere with the natural flow of streams not only when at ordinary heights, but also when swollen with floods to which they are subject. A sufficient opening for the discharge of waters in times of flood as well as at other times must be left, and the city or village will be liable for any failure to so design their structures if land is flooded or damaged.[6] Culverts, aqueducts, and drains must be constructed of sufficient length and cross-section to carry away waters of occasional extraordinary floods.[7] When injuries have resulted, it is no defense that the culvert was constructed in the usual manner.[8] Any structure maintained by a railroad company in such a manner as to constitute a nuisance will make the company liable for the damages resulting, notwithstanding it was originally erected by the county under legislative authority.[9]

118. Injunction to Restrain Obstruction of Stream, Without Proof of Damages.—It is not necessary to wait until the injury has been done if it can

[1] Masonic Temple Ass'n *v.* Banks (Va.), 27 S. E. Rep. 490.
[2] Illinois Cent. R. Co. *v.* Wilbourn (Miss.), 21 So. Rep. 1.
[3] Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39. *See* Orvis *v.* Elmira C. & N. R. Co. (Sup.), 45 N. Y. Supp. 367.
[4] Wabash R. Co. *v.* Sanders, 58 Ill. App. 213.
[5] Haynes *v.* Burlington, 38 Vt. 350.
[6] Wabash R. Co. *v.* Sanders, 58 Ill. App. 213; New York Union T. Co. *v.* Cuppy, 26 Kan. 754; 28 Amer. & Eng. Ency. Law 968, and cases cited.
[7] Carriger *v.* E. Tennessee R. Co. (Tenn.), 7 Lea 388.
[8] Van Orsdol *v.* Burlington, etc., R. Co., 56 Ia. 470.
[9] Payne *v.* Kansas City, etc., R. Co., 112 Mo. 6; Ohio & M. Ry. Co. *v.* Thillman (Ill.), 32 N. E. Rep. 529.

be shown that damages will result. An action will lie to restrain a railroad company from flooding plaintiff's land by the construction of an embankment across a stream, with an insufficient culvert to permit the passage of the water, even though no damages have as yet accrued, where no money judgment is asked.[1] If there be a reasonable doubt whether the work, as the filling in under a bridge, will obstruct the natural flow of water, an injunction will be denied until the question is determined by the actual use of the property.[2]

119. Structures must be Kept Free of Obstructions.—It is the duty of a railroad company to keep its culverts unobstructed.[3] It is not liable for injuries if it has exercised ordinary care in keeping the opening to the culvert unobstructed and has constructed it of sufficient capacity originally.[4]

An owner of land which is drained of surface-water by a ditch of defendants, whose duty it is to keep the ditch unobstructed, need not enter on the premises of defendant and remove the obstructions in order to recover damages resulting to his crops by an overflow occurring afterwards because of such obstructions.[5] If the structure might have been expected to prevent the flow under such conditions, and if such conditions were likely to arise, and could have been provided for, it is no defense that the conditions arose by the negligence of third persons in throwing rubbish into the water.[6]

A riparian owner is not in duty bound to keep his land (a ravine) free from accumulations and débris, so that it shall not be carried by high waters and obstruct a culvert or passageway.[7] A town has been held not to be required to keep open a culvert opposite the premises of an adjoining owner merely to discharge surface-waters.[8]

If a bridge cause the water and ice to gorge and overflow adjacent lands, the company will be liable for damages from the overflow. For this to be true, it is submitted that the gorging must have been proved to have been the result of the design or character of the bridge built,[9] and in the absence of proof to the contrary it is proper to presume that the structure was properly constructed.[10]

120. Culverts in Railroad Embankments.—For a railroad company to build a solid embankment for its track over a depression forming a natural channel, wherein surface-water was accustomed to flow, when it was prac-

[1] Lake Erie & W. R. Co. *v.* Young (Ind. Sup.), 35 N. E. Rep. 177; Phila. W. & B. R. Co. *v.* Davis (Md.), 11 Atl. Rep. 822 [1888].

[2] Barnard *v.* Commissioners, 71 Ill. App. 187 [1897].

[3] West *v.* Louisville, etc., R. Co. (Ky.), 8 Bush 404; Shahan *v.* Alabama R. Co. (Ala.), 22 So. Rep 449, 509; Texarkana & Ft. S. Ry. Co. *v.* Parsons (C. C. A.), 74 Fed. Rep. 408; *semble* Henry *v.* Ohio R. R. Co. (W. Va.), 21 S. E. Rep. 863.

[4] Fick *v.* Penn R. Co. (Pa. Sup.), 27 Atl. Rep. 783.

[5] Baltimore & S. P. R. Co. *v.* Hackett (Md.), 39 Atl. Rep. 510 [1898].

[6] Babbitt *v.* Safety Fund Nat. Bank (Mass.), 47 N. E. Rep. 1018 [1897].

[7] Simpson *v.* Stillwater W. Co. (Minn.), 64 N. W. Rep. 1144.

[8] Byrne *v.* Farmington, 64 Conn. 367. *And see* Gardiner *v.* Camden, 86 Me. 376.

[9] McCleneghan *v.* Omaha, etc., R. Co., 25 Neb. 523.

[10] Morrisey *v.* Chicago, B. & Q. R. Co. (Neb.), 56 N. W. Rep. 946.

ticable to construct a culvert through the embankment, is negligence.[1] Such openings must be provided, by bridges and culverts, as will discharge surface-waters in their natural channels.[2] However, the mere absence of culverts or drains in a railroad roadbed to permit the passage of water under the roadbed does not of itself render the railroad company liable for damage to land on the higher side by an overflow, unless the water might have been discharged through such culverts in such manner as not to injure the owners of land on the lower side by its discharge.[3] As a general rule, the obstruction of the flow of mere surface-water from land by the construction of a railroad does not constitute a cause of action in favor of the landowner.[4]*

When, after an unprecedented rainfall, a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, and, in order to protect the embankment, the defendants cut trenches in it by which the water flowed through and went ultimately on the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut, and the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently, it was held that, though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable.[5]

To recover damages against the bridge or railroad company it must be shown that the damages would not have occurred if the embankment had not been located where it was.[6]

A city in building an embankment across a watercourse within its limits, leaving thereunder a culvert to discharge the waters, does not insure the sufficiency of the culvert at all times, as after an unusual rain. It must have exercised due and proper care. It is only liable where, in the construction of the embankment and culvert, it has failed to employ and follow the reasonably justified and honestly given advice of competent engineers.[7]†

121. Openings in the Clear for Navigation.—Where a company has been authorized to construct a bridge by an act which requires, among other

[1] Jungblum *v.* Minneapolis, N. U. & S. W. R. Co., 72 N. W. Rep. 971.

[2] Norfolk & W. R. Co. *v.* Carter (Va.), 22 S. E. Rep. 517; Borchsenius *v.* Chicago, etc., Ry. Co. (Wis.), 71 N. W. Rep. 884; Ohio & M. Ry. Co. *v.* Thillman (Ill.), 32 N. E. Rep. 529.

[3] Borchsenius *v.* Chicago, St. P. M. & O. R. Co.(Wis.), 71 N. W. Rep. 884.

[4] Hanlin *v.* Chicago & N. W. Ry. Co., 61 Wis. 515 [1884]. *And see* 62 Wis. 116; 63 Wis. 183, 232, and 329; 69 Wis. 561; 70 Wis. 444.

[5] Whalley *v.* Lancashire & Yorkshire Ry. Co., L. R. 13 Q. B. Div. 131 [1884].

[6] Morris *v.* Receivers of R. Co. (C. C.), 65 Fed. Rep. 584.

[7] Taubert *v.* St. Paul (Minn.), 71 N. W. Rep. 664.

* *See* Secs. 176–179, *infra*.

† *See* Wait's Engin. & Arch. Jurisp., §§ 245–248.

things, that the openings of the draw of such bridge shall be 130 feet in the clear, and that the plans shall be approved by the Secretary of War, and which provides that the bridge shall not be built until such plans have been approved, and the bridge has been built with openings of the draw only 125 feet in the clear, and no evidence is offered to show that the plans had ever been submitted to, or approved by, the Secretary of War, it was held that the bridge was an illegal structure and a public nuisance, and the company is liable for any damages resulting therefrom.[1]

If it be stipulated that there should be "a draw in said bridge in the channel of the river in such place as the same is deepest and most easily navigable, not less than thirty feet wide, for the passage of vessels through said bridge," and if the bridge be not built directly across the current, perpendicular to it, then it must leave a clear width of thirty feet open across the channel, estimating with reference to its curve and the obliquity of the bridge.[2]

The public is entitled to the unobstructed use of every part of a navigable river, from bank to bank, which at the ordinary stage of the water is of such depth and accessibility, with respect to the main body of the stream, as to be capable of navigation by boat, or of valuable floatage, whether such part has ever been so used or whether there is any present or anticipated necessity for so using it.[3]

Where a railroad company, under authority from the state, constructed its bridge across the inlet of a navigable river, over land owned by the state, in such a way that the riparian owners above the inlet had reasonable means of access to the channel of the river for boats which the inlet in its natural state would float, it was held that the bridge was not an illegal obstruction, as regards a riparian owner desiring to secure access to the river channel by an artificial channel for use by large boats, so as to entitle such owner to damages for such obstruction.[4]

The person obstructing a stream may be liable to persons using it for navigation, as when plaintiff was prevented from floating lumber, to market for delivery, which he had already sold.[5]

A large raft of saw-logs, belonging to the defendant, while being towed across a navigable lake was broken up, and the logs scattered in many direc-

[1] Texarkana & Ft. S. Ry. Co. *v.* Parsons (C. C. A.), 74 Fed. Rep. 408. See Gildersleeve *v.* N. Y., N. H. & H. R. Co., 82 Fed. Rep. 763 [1897], where the channel had a sloping rip-rap below low water.

[2] Alsante *v.* Charlestown Bridge Co., 41 Fed. Rep. 365. *See* United States *v.* Rider (Dist. Ct.), 50 Fed. Rep. 406, as to what is not a reasonable time to erect a drawbridge.

[3] Tennessee & C. R. Co. *v.* Danforth (Ala.), 20 So. Rep. 502. *See* Hedges *v.* West Shore R. Co. (N. Y. App.), 44 N. E. Rep. 691.

[4] Hedges *v.* West Shore R. Co. (N. Y. App.), 44 N. E. Rep. 691; 30 N. Y. Supp. 92 *reversed. And see* Potter *v.* Ind., etc., R. Co. (Mich.), 54 N. W. Rep. 956.

[5] Glick *v.* Weatherwax (Wash.), 45 Pac. Rep. 156.

tions, by an unexpected storm. Many of the logs were afterwards recovered, and reasonable efforts made to recover the others, which were still floating on the lake about six months afterwards, when a storm of unprecedented severity and fury arose and drove some of the logs with great force against a breakwater constructed to protect plaintiff's railroad tracks and embankment, breaking it, and letting in the water, greatly damaging plaintiff's property. It was held that the defendants were not liable for such damage, though they claimed the logs.[1]

[1] New Orleans & N. E. R. Co. *v.* McEwen & Murray, 22 So. Rep. 675.

CHAPTER IX.

PROTECTION OF BANKS AND STRUCTURES FROM WATERS.

131. In Protecting Bank or Structures Care and Skill must be Exercised.—A riparian owner must exercise reasonable care and skill and avoid defects in the erection of a barrier to his own land, and is liable for injuries to others for the want of such care and skill.[1] These cases of protection of one's property from the encroachments of a stream frequently come up in the protection of railroad embankments and other railroad structures. If a railroad embankment be constructed in a creek's mouth so as to prevent the water from flowing in its accustomed channel to the injury of another, the company will be liable for such injury if it be from the direct and immediate consequences of the act.[2]

A riparian proprietor has no right to construct a levee which will raise the water flowing in the stream at times of ordinary floods so as to endanger the bridge and other structures of the railway, and will also throw such water upon lands on the opposite side of the river, thereby subjecting the railway company to suits for damages.[3] The fact that a riparian owner has altered a bank, embankment, or structure does not in itself show a cause of action; the complaint must allege and disclose some tortious act.[4]

132. Must Exercise Prudence, Foresight, and Good Judgment.—A riparian owner has no right to divert a stream, from any part of its accustomed course, to the injury of other owners. His efforts to protect his property must be confined to the protection of his land from overflow by any change from the natural state of the stream, and to prevent any change in its old course. He has not the right, for his own greater convenience and benefit, to build anything which in times of ordinary flood will throw the water on to the grounds of another owner so as to overflow and injure them.[5] That a dam was erected to protect one's land from an increased volume of water is

[1] Grant *v.* McDonogh, 7 La. Ann. 447; Savannah, etc., R. Co. *v.* Lawton, 75 Ga. 192.

[2] Tinsman *v.* Belvedere, etc., Co., 26 N. J. Law, 148.

[3] Cairo, V. & C. Ry. Co. *v.* Brevoort (C. C.), 62 Fed. Rep. 129.

[4] Koch *v.* Del., L. & W. R. Co. (N. J.), 24 Atl. Rep. 442.

[5] Parker *v.* Atchison (Kan.), 48 Pac. Rep. 631; Burwell *v.* Hobson (Va.), 12 Gratt. 322; Koch *v.* Delaware, L. & W. R. Co. (N. J. Sup.), 24 Atl. Rep. 442.

no defense to an action by one riparian owner against another for obstructing a stream by the dam.[1]

The owner of land situated upon a stream of water has the right to construct embankments thereon for the purpose of protecting it from the currents of the stream or otherwise benefiting it, subject to the duty of so constructing the same as not to occasion material injury to the land of others situated upon the stream, where the same may be avoided by the exercise of ordinary care, intelligence, and foresight. It is his duty, in the first instance, to exercise such prudence and care as an ordinarily careful and intelligent man might have exercised, to determine whether his proposed embankments would cause material injury to the lands of his neighbor at the time of such floods as might reasonably be anticipated at any season of the year. By material injury must be understood an injury resulting in damages of a substantial nature, not merely nominal, and which are, in some cases, awarded to prevent a wrong from ripening into a right by a lapse of time. The use of streams and their water is, among riparian proprietors, a matter of common right, and an invasion of the individual right of one cannot be appreciated until some act is done by another in excess of the common right.[2]

Where an owner constructs an embankment for the protection of his own lands, and the same occasioned substantial injury to the lands of his neighbor, and it might have been reasonably anticipated as one of the probable results of its action upon the currents of the stream at the time it was constructed, and would have been anticipated by a man of ordinary prudence and intelligence, the owner is liable in damages for the injury so occasioned; otherwise not. Where it appears, from the subsequent action upon the current of a flood that might reasonably be expected to recur in the course of the seasons, that it causes, and will continue at the time of such floods to occasion, substantial injury to his neighbor, it then becomes his duty to abate or so modify it as to avoid such injury; and if he fails to do so, he must, from the time its tendency to do injury became apparent, respond in damages awarded for the injury occasioned for the time just stated.[2]

133. Return of Stream to its Old Channel.—If, during times of flood, the stream breaks from its natural course and encroaches upon the land of a riparian owner, he may, by embankments, piling, and cribwork, return the stream to its old channel. During freshets streams often cut through the banks and make new channels where they would continue to run if not prevented. In such cases the owner through whose land it has cut may for his own protection erect a barrier across the new channel in order to confine the waters to their original course. He should not build such a barrier into the stream so as to interfere with its original flow, nor should he build it

[1] Bliss *v.* Johnson (Cal.), 18 Pac. Rep. 785 [1888]

[2] Cranford *v.* Rambo (Ohio), 22 Reptr. 529 [1886]; Hunter *v.* Pelham Mills (S. C.), 29 S. E. Rep. 727 [1898].

higher than the original bank if such extra height will cause damage to his neighbors.[1]

Piling, cribwork, or a dam across the newly made channel should be built before the right has been lost by acquiescence in the flow in the new channel.[2] *

134. Protection of Land from Encroachment of Stream.—Embankments or barriers may be erected by a riparian owner to protect his land from an overflow, or to prevent a change in the natural course of the stream, or the making of the channel. He may take such steps for the protection of his land and for the keeping of the channel in its old course, if he does not thereby throw the waters upon another's land. He must take care not to do injury to his neighbor even in the case of freshets and ordinary floods.[3]

If a change in the course of a stream be threatened, he may build a bulkhead as high as the original bank was before it was washed away.[4] Each riparian owner has a right to the enjoyment of the waters of a stream as it flows by his premises, and a right also to modify and limit the current upon the property as will best subserve his own notions of propriety. He may construct and maintain embankments to protect any part of his land from being injured by overflowing of the stream in times of high water. His right to deal with the stream and control its current must be exercised, however, with a just regard to the rights of others. He may not divert the waters of the river from his lands and cause them to flow over, upon, or against those of his neighbor to the latter's substantial injury, no matter how beneficial it may be to his own lands.[5]

To what extent a riparian owner may go to protect himself will depend of course upon the peculiar circumstances of each case. It has been held that he was not answerable for damages caused by protecting himself from extraordinary or unusual floods. It has been held that a canal company, fearing a flood and overflow of a river into the canal, may insert planks in the canal embankment to keep the overflowing water out of the canal. In a case where a canal company had adopted such a means of protection and the water found its way into the canal and by reason of the planking rose to a greater height than it would otherwise have done, to the injury of the owner, it was held that the canal company was not liable, as it had done nothing to

[1] Pierce *v.* Kinny (N. Y.), 59 Barb. 56; Parker *v.* Atchison (Kan.), 48 Pac. Rep. 631.

[2] Woodbury *v.* Short, 17 Vt. 387.

[3] Parker *v.* Atchison (Kan.), 48 Pac. Rep. 631; Barnes *v.* Marshall, 68 Cal. 569; Boston Mfg. Co. *v.* Burgin, 114 Mass. 340; Shelbyville Tpk. Co. *v.* Green, 99 Ind. 205; Cairo, etc., Co. *v.* Stevens, 73 Ind. 278; Ohio & M. Ry. Co. *v.* Webb (Ill. Sup.), 32 N. E. Rep. 527; Collins *v.* Macon, 69 Ga. 542; Knight *v.* Albemarle R. Co. (N. C.), 15 S. E. Rep. 929; Diedrich *v.* N. W. Union R. Co., 42 Wis. 248; Miller *v.* Milwaukee, 14 Wis. 642.

[4] Barnes *v.* Marshall, 68 Cal. 569.

[5] Cranford *v.* Rambo, 44 Ohio St. 279; Parker *v.* Atchison (Kans.), 48 Pac. Rep. 631.

* As to what length of time will be considered an acquiescence, *see* Secs. 500, 661–681.

affect the natural channel of the river, but had only tried to protect itself against a threatening disaster which was common to both.[1]

135. Riparian Owners Have Equal Rights to Protect their Lands.—When a riparian owner has sought to protect his land by an embankment which causes more than the natural flow upon the land of a neighbor, he cannot complain if his neighbor also protects himself by embankments and dams and throws water back upon him.[2] To what extent two opposite riparian owners could carry this warfare would probably depend upon its effect upon up-stream riparian owners. Such a warfare should not be encouraged by the courts, for it could not be persisted in without serious injury to other interests.[3]

136. Protection Against Overflow in Times of Flood.—In wide valleys where flood-waters cover large tracts of land, the water of such overflowing may be considered as surface-water, and a landowner incurs no liability in protecting his land from such waters by throwing them back upon an upper riparian owner.[4] *

The owner of a railroad right of way may protect it by embankments from surface-water which would otherwise flow on it from adjoining lands.[5] If a landowner has erected barriers to keep the overflow upon others' lands from coming upon his lands, he must also take care of the waters from rain and snow and surface drainage which come upon his lands. If he cannot within the limits of his lands turn them into a natural watercourse, it may be a problem to get rid of them. He may not collect them in a well-defined watercourse and discharge them upon the land of his neighbor,[6] nor against the land of a lower riparian owner.[7] The overflow of flooded lands is regarded as a common enemy which each proprietor may protect himself against as he will.[8]

A railway company is not liable for damage caused by water thrown back upon land, by the construction of its embankments, from depressions in the ground, in which water flows only when a neighboring river overflows its banks.[9]

An owner of flat lands in a valley has a right to protect himself from overflow from the river in times of flood, even though by so doing he deepens the water over the lands of his neighbors. A city may protect itself from

[1] Nield *v.* London, etc., R. Co., L. R. 10 Exch. 4; Mailhot *v.* Pugh, 30 La. Ann. 1359.

[2] Merritt *v.* Parker, 1 N. J. L. 460; Wilhelm *v.* Burleyson, 106 N. C. 381.

[3] Avery *v.* Empire W. Co., 82 N. Y. 582; Harding *v.* Whitney, 40 Ind. 379

[4] Schlichter *v.* Phillipy, 67 Ind. 201; Benthal *v.* Seifert, 77 Ind. 302; Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271.

[5] Jean *v.* Pennsylvania Co. (Ind. App.), 36 N. E. Rep. 159.

[6] Cairo, etc., R. Co. *v.* Stevens, 73 Ind. 278.

[7] *See* Rudel *v.* Los Angeles Co., 50 Pac. Rep. 400.

[8] Cairo, etc., R. Co. *v.* Stevens, *supra.*

[9] New York, C. & St. L. R. Co. *v.* Speelman (Ind. App.), 40 N. E. Rep. 541.

* *See* Secs. 171–200, Surface-waters, *infra.*

overflows by building levees.[1] One who plants trees which prevent large quantities of driftwood and other materials from being carried down-stream is not liable to an up-stream riparian owner for the increased flooding of his land nor the floating of driftwood upon it.[2]

137. Deflection of Stream Against Lower Riparian Owner.—If the size and capacity of the culverts is insufficient to carry off and properly discharge the waters of a creek in times of flood, a railroad company will be liable if the abutments of the structure are placed obliquely to the course of the stream in such a manner as to turn the water upon the banks. If floods erode and wash away the same, the company will be liable, especially where it appears that the bridge could have been erected with safety to the railroad company, so as not to injure the same lands, at an additional expense.[3] Abutments should be so placed as not to deflect the currents of the stream against other structures or against lands subject to errosion.[4] If an embankment built in front of one's premises and extending somewhat into a stream's channel forces water during an unusual freshet on to the land of the opposite shore, wearing away the land, the owner of the embankment is liable.[5]

The law applicable to a case where an owner of land on one side of a navigable river, which forms the boundary between two states, has by artificial structures turned the waters upon or against the land of an owner on the opposite side of the river is that based upon the general principles of the law. The decisions of the state courts are not binding on the federal courts in such a case.[6]

138. Measure of Damages for Deflection of Waters.—The measure of damages for injuries to land by the washing of the soil is held to be the difference in value of the land before and after the overflow, and of the improvements, their actual cash value, or such sum as would, if properly expended, restore the premises to their former condition; and if the beneficial enjoyment of the premises has been interfered with by the destruction of the improvements, the rental value for the time necessary to restore the improvements should be added to the value of the property destroyed.[7]

A judgment for consequent damages will not bar a subsequent action for damages caused by keeping the structure in bad condition.[8] It may be

[1] Hoard *v.* Des Moines, 62 Iowa 326; Gray *v.* McWilliams, 98 Cal. 157. *And see* Lamb *v.* Reclamation Dist., 73 Cal. 125.

[2] Taylor *v.* Fickas, 64 Ind. 167.

[3] Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14; Wabash R. Co. *v.* Sanders, 58 Ill. App. 213; Shahan *v.* Alabama, etc., R. Co. (Ala.), 22 So. Rep. 449, 509.

[4] Hartman *v.* Pittsburg I. P. Co. (Pa. Sup.), 28 Atl. Rep. 145; De Baker *v.* Southern Cal. Ry. Co. (Cal.), 39 Pac. Rep. 610.

Hartshorn *v.* Chaddock (N. Y. App.), 31 N. E. Rep. 997; Rogers *v.* Coal R. B. & D. Co. (W. Va.), 23 S. E. Rep. 919, *a boom;* Koch *v.* Del. L. & W. R. Co. (N. J.), 24 Atl. Rep. 442.

[6] Cairo, etc., R. Co. *v.* Brevoort (C. C.), 62 Fed. Rep. 129.

[7] Graves *v.* Kansas City, P. & G. R. Co., 69 Mo. App. 574; Gallagher *v.* Kingston W. Co. (N. Y.), 25 App. Div. 82; Sweeney *v.* Montana Cent. Ry. Co. (Mont.), 47 Pac. Rep. 791.

[8] Cleveland, etc., Ry. Co. *v.* Nuttall, 59 Ill. App. 639.

shown that, at small expense for rip-rap, the injury could have been avoided or materially diminished.[1] The situation of the property, as of a mill with respect to custom and trade and the productiveness of the neighborhood in grain crops, may be shown.[2]

Another source of injury to riparian property owners caused by obstructions is the filling up of the channel with sand and silt where the water set back is dead and still. If such injury result from the maintenance of a dam or other obstruction, the owner thereof will be liable.[3]

[1] Sweeney *v.* Mont. Cent. Ry. Co. (Mont.), 47 Pac. Rep. 791; *but see* Austin, etc., R. Co. *v.* Anderson (Tex.), 19 S. W. Rep. 1025.

[2] Gallagher *v.* Kingston W. Co. (N. Y.), 25 App. Div. 82.

[3] Cline *v.* Baker (N. C.), 24 S. E. Rep. 516; Cooley *v.* McKinney (Ga.), 14 S. E. Rep. 190; *and see* Jones *v.* DeCoursey (Sup.), 42 N. Y. Supp. 578.

CHAPTER X.

SUPPLY OF WATER AND ICE. WATER COMPANIES AND WATER-WORKS.

141. Ownership and Control by Municipal Corporations.—A municipal corporation has no right to incur expenditures for public water-works unless the power is conferred by legislative authority. Like any corporation it is a creature of statutory existence. It can exercise no powers or rights other than those conferred by statute either expressly or by fair implication. Water-works for supplying cities and towns with water are for public municipal purposes, and the legislature may confer authority upon municipalities to erect, operate, or purchase such works, and to incur expenditures, levy taxes, and issue bonds for the payment thereof. A power to make all contracts which may be deemed necessary for the general welfare of the city has been held to include the power to provide water-works.[1]

142. Authority Conferred by Certain Statutory Provisions.—A power to construct a system of water-works has been held to authorize the contract to be made without passing ordinances authorizing the works to be constructed.[2] Power to provide for the ordinary expenses of a town authorizes it to procure a supply of water in a public square, and the city council may constitute themselves the judges of the mode best calculated to accomplish that object.[3] Power to provide for maintenance of fire-engines for the extinguishment of fires has been held to confer incidental power to make provisions by reservoirs or other means for the supply of water, without which the engines would be useless.[4] The time in which a city may purchase a franchise of a water-works company must be exercised within the limit of time fixed by the statute.[5]

On the other hand it has been held that a charter which contained a general-welfare clause conferred no power upon the city to grant a franchise to the water company. It was held that even though a city had power, by

[1] 29 Amer. & Eng. Ency. Law 2, *and cases cited.*

[2] The Nat. Tube Wks. Co. *v.* Chamberlain, 5 Dak. 54.

[3] Livingston *v.* Pippin, 31 Ala. 542.

[4] Hardy *v.* Waltham (Mass.), 3 Met. 163. For powers under general authority to make contracts for the construction of water-works, see Rome *v.* Cabot, 28 Ga. 50.

[5] Ziegler *v.* Chapin, 126 N. Y. 342.

virtue of its duty to care for the public welfare and safety, to contract for the supply of water, yet it could not without express legislative authority construct, maintain, or operate water-works. Under authority to provide for a supply of water, a city may contract with a water company for that purpose; but the reverse of this is not true, namely, that authority to enter into a contract with a party to supply the city with water did not authorize the erection of water-works owned by the city. A general statute conferring the power upon all cities and incorporated towns to construct water-works has been held to apply to cities acting under special charters as well as under the general corporation law.[1]

143. Powers Conferred by the Legislature upon Water Companies.— The legislature may confer upon a city or a company organized for that purpose the right to condemn private property for a water-supply. It may authorize the erection of a dam in a navigable river, provided such a dam does not materially obstruct navigation.[2] Not only may lands be condemned, but water may be taken from public streams or ponds, provided just compensation is made to riparian owners. If the city is a riparian owner upon the stream, it may take only a reasonable amount of the water, the same as any riparian owner, and will be liable to those injured for any excess taken.[3] If a water-works supply a greater quantity than is needed for the present public use, the city may, it seems, dispose of the surplus to outsiders without destroying the public character of the works.[4] *

A statute giving the city authority to provide water and so forth, authorizing the city council to make such ordinances as might be deemed necessary, was held to give the city power to acquire all water rights necessary to supply the inhabitants with water. If a riparian owner stands by and permits a city to erect works for a water-supply without first paying him damages, and, by taking water from the stream, diminish his mill-power, it creates an equitable estoppel which will prevent him from securing the protection of an injunction, but will leave him to assert his rights at law.[5] †

When, however, water from springs has been appropriated under an act authorizing the trustees of a village to supply the village with water, and no provisions for indemnifying riparian owners have been made, it was held that an injunction might be granted to prevent any proceeding to divert the stream until provision was made for compensation to those injured.[6]

The diversion of waters of a stream or spring will not, it seems, be

[1] 29 Amer. & Eng. Ency. Law 3.
[2] State *v.* Eau Claire, 40 Wis. 533; Pompelly *v.* Green Bay C. Co., 13 Wall. (U. S.) 166; 29 Amer. & Eng. Ency. Law 5.
[3] Ætna Mills *v.* Waltham, 126 Mass. 422.
[4] State *v.* Newark (N. J.), 40 Amer. & Eng. Corp. Cas. 33 [1891]. *And see* Pocantico W.-w. Co. *v.* Bird (N. Y. App.), 29 N. E. Rep. 246.
[5] Logansport *v.* Uhl, 99 Ind. 531.
[6] Gardner *v.* Newburg (N. Y.), 2 Johns. Ch. 162. *And see* Smith *v.* Rochester, 92 N. Y. 463.

* *See* Secs. 60–63, *supra.*

† *See* Secs. 661–670, *infra.*

allowed unless it is clearly necessary for the public good, and the question of necessity should be controlled by the court. There should be satisfactory evidence of the need.[1] Where the waters of the creeks from which a water company receives its supply are insufficient in the summer-time to supply the present wants of the inhabitants of a growing city to whom the company furnishes water, the city shows a necessity for condemning the waters of a stream sufficient in quantity and superior in quality, all other streams nearer the city being used by the water company.[2]

The open, notorious, exclusive, uninterrupted, and adverse use of waters from a pond, stream, canal, or aqueduct for the prescriptive or statutory period creates a right to the enjoyment of such waters to the extent of such use.[3]* One cannot acquire a prescriptive right to pollute a stream after it has been appropriated for the purpose of supplying a city with pure water.[4] †

144. Negligent Construction of Water-works.—In the operation of water-works by a city, a municipal corporation is regarded as a private corporation, and therefore is liable for injuries resulting from the negligent construction and operation of its works. The city does not, however, insure its inhabitants against damages from the construction and operation of its works. Liability can only arise from a failure to exercise reasonable care and vigilance.[5]

The owner of the bed of a river, who also had the right to divert its waters and sell them to citizens, has been held not liable for damages caused to private property due to the sudden overflow of the waters of the river.[6]

145. Negligence in Laying and Maintaining Pipes, etc.—A city has been held liable for injuries to travelers resulting from negligence in laying and maintaining water-pipes in its streets. Such liability doubtless grows out of the fundamental principle of the law, that a city is bound to maintain its streets in a reasonable and safe condition. If the street is undermined by water escaping from the pipes laid therein, and a traveler sustains injury, the city may be held liable.[7]

Where water-plugs, boxes, and covers project above the grade of the street, causing persons or horses to stumble and fall over them, or vehicles to be upset, if such projections are due to negligence or want of ordinary care in construction, the company is liable for the injury sustained.[8] It was so held when the projection was due to the highway being worn away.[9] If

[1] State *v.* Morris Eq., 26 N. J. L. 495.
[2] Santa Cruz *v.* Enright (Cal.), 30 Pac. Rep. 197; Pocantico W. Co. *v.* Bird (N. Y. App.), 29 N. E. Rep. 246; Spring Val. W. Co. *v.* San Mateo W., 64 Cal. 123.
[3] Smith *v.* Green (Cal.), 41 Pac. Rep. 1022; Bucklin *v.* Truell, 54 N. H. 122 [1873]; Cole *v.* Bradbury, 86 Me. 380; Alhambra W. Co. *v.* Richardson (Cal.), 14 Pac. Rep. 379.
[4] Martin *v.* Gleason, 139 Mass. 183.
[5] 29 Amer. & Eng. Ency. Law 8; Rigdon *v.* Temple W.-w. Co. (Tex.), 22 S. W. Rep. 828, where a water-tower collapsed. *See* Wait's Engin. & Arch. Jurisp., Secs. 641–646.
[6] Moore *v.* Los Angeles, 72 Cal. 287.
[7] Hand *v.* Brookline, 126 Mass. 324.
[8] 29 Amer. & Eng. Ency. Law 9.
[9] Kent *v.* Worthing, L. R. 10 Q. B. Div. 118.

* *See* Secs. 682–690, *infra*.

† *See* Secs. 201–230 and 682–685, *infra*.

reasonable care and diligence have been exercised in laying and maintaining the pipes, valves, boxes, etc., the water company will not be liable for injuries resulting from their projection.[1] For injuries due to the frightening of a horse by a stream of water thrown from a city hydrant across the highway, the city was held liable.[2]

146. Private Water Companies.—Power to supply water to any particular locality may be delegated by the legislature to an individual or a corporation unless such delegation is expressly forbidden by the constitution. The powers conferred must be within the provisions of the general laws of the state. Such a corporation cannot in general become active or exercise the powers contemplated by its organization, except on special and direct authority conferred by the state. To condemn and appropriate sources of water-supply, and to enter upon public streets or roads for the laying of pipes or mains therein, requires express permission from the state or the municipality.[3]

Water companies being the beneficiaries of important and valuable franchises and privileges from the state, and the purpose for which they were created being for public purposes, they are called public corporations and are subject in their operations to the limitations and regulations which the legislature may impose upon such bodies in order to protect public interests.

A water company may own and exercise franchises in other states than that in which it is incorporated, although not expressly authorized so to do in its charter.[4]

147. Exclusive Franchises to Water Companies.—Unless prohibited by the constitution of the state, the legislature may grant to a private corporation the exclusive right to lay pipes and mains through the streets of the city, and to supply it and its inhabitants with water both for general use and for fire protection. A constitutional inhibition against the creation of perpetuities and monopolies has been held to forbid the grant of such an exclusive privilege even for a term of years.[5] The city has no power to grant an exclusive right of this character, unless authorized to do so in express terms by the legislature. The validity of an ordinance conferring such an exclusive right may be contested by any company or individual claiming a similar right, but, it seems, not by a taxpayer.[6]

Under an act[7] which authorized a city to grant a right to construct and maintain water-works therefor, and also to construct and maintain pipes

[1] Terry *v.* New York, 80 Bosw. (N. Y.) 504; Staples *v.* Dickson, 88 Me. 362.

[2] Aldrich *v.* Tripp, 11 R. I. 141. *See* Topeka W. Co. *v.* Whiting, 50 Pac Rep. 877.

[3] 29 Amer. & Eng. Ency. Law, 11.

[4] Dodge *v.* Council Bluffs, 57 Ia. 560; Peabody *v.* Westerly W.-w. Co. (R. I.), 37 Atl. Rep. 807.

[5] Brenham *v.* Brenham W. Co., 67 Tex. 542; Long *v.* Duluth (Minn.), 51 N. W. Rep. 913. *But see* Bartholomew *v.* Austin (Tex. U. S. C. C. A.), 85 Fed. Rep. 359 [1898].

[6] Grant *v.* Davenport, 36 Ia. 396; Dodge *v.* Council Bluffs, 57 Ia. 560.

[7] Laws Kan. 1891, p. 126, § 3.

under the streets to convey water to other cities, and which provided by another section that no grant under the preceding section should continue more than twenty years, that any such grant might be revoked at any time after ten years, and that the city might acquire the water-works property, it was held that the first section contemplated two distinct matters—construction of water-works in the city, and laying pipes across the city; that the latter section related only to the former, and placed no limit to the duration of a grant under the latter; hence an accepted grant under the latter could not be revoked.[1]* Exclusive rights granted by a government in which the public are interested are not in favor with the courts, and any act of the legislature which has the effect to impair future action on the part of the legislature or city council will be construed most favorably to the state.[2] If any ambiguity exists, or if there be any reasonable doubt as to the power granted, or as to whether a privilege be exclusive, it will be construed against the corporation or individual claiming such exclusive privilege. A contract granting to a water company the privilege of laying its mains in the streets, with a covenant by the town to pay hydrant rentals, is to be strictly construed in favor of the public, and therefore should not be taken as an exclusive grant.[3] When a right has been granted and the grantee has accepted it and acted upon it, it constitutes a contract protected by the federal constitution against impairment by a state legislature.[4]

An exclusive franchise granted to a corporation to furnish water to a city has been held to be violated by a grant to an individual in the city of a right to supply his own premises with water in a like manner.[5] A grant of the exclusive right to supply a municipality from a designated source for a term of years was held not impaired by grant to another party to supply it with water from a different source.[6]

148. Quantity and Quality of Water-supply.—Under a contract to supply "well-settled and wholesome water," a city need not accept and pay for water unless it is of the quality called for by contract. Occasional use by a city of water actually furnished does not necessarily constitute an acceptance. There must be a fair opportunity for examination and objection before acceptance can be inferred.[7] To recover for water furnished, a water company must prove substantial compliance with its contracts, not only with reference to the quantity of water furnished, but as to the quality.[8]

[1] National W. Co. *v.* Kansas City (C. C.), 65 Fed. Rep. 691.

[2] St. Anthony Falls W. P. Co. *v.* Board, 168 U. S. 349.

[3] Long Island Water-supply Co. *v.* City of Brooklyn, 17 Sup. Ct. Rep. 718; Westerly W.-w. Co. *v.* Westerly (C. C.), 80 Fed. Rep. 611.

[4] 29 Amer. & Eng. Ency. Law 13. *See* Wait's Engin. and Arch. Jurisp., Sec. 144.

[5] New Orleans Water Co. *v.* Rivers, 115 U. S. 674; St. Tammany W.-w. *v.* New Orleans W.-w., 120 U. S. 64.

[6] Stein *v.* Bienville W. S. Co., 141 U. S. 67.

[7] Winfield W. Co. *v.* Winfield, 51 Kan. 104.

[8] *See* Adrian W.-w. *v.* Adrian, 64 Mich. 584; State Trust Co. *v.* Duluth (Minn.), 73 N. W. Rep. 249 [1897].

* *See* Secs. 841–860, *infra*.

A resolution of the common council reciting that water-works satisfy the test required by the ordinance does not prevent the city that has granted the privilege for a specific time to construct water-works and furnish water from maintaining an action to rescind the contract, the works having proved inadequate, and the water-supply deficient both in quality and quantity.[1] If, however, a city has accepted and used water for nearly a year without objection, and the water appears to be good and is believed to be good, the city cannot then claim as a defense that the water was not good, and refuse to pay anything for it.[2]

A contract for water-supplies entered into by a city at the same time an invalid franchise was granted is not separable from the grant, but both are invalid; the city, however, is bound to pay for the amount of water actually received and used, though the contract is invalid.[3] The invalidity of the exclusive grant by a city of the right to use its streets to conduct water to its inhabitants is no defense to an action for rents the city promised to pay for the use of the hydrants after the works have been constructed according to the contract and have been accepted by the city.[4]

When a company has undertaken to furnish a city with filtered water, equity may decree a specific performance of the contract, as an action for damages would not afford adequate relief, and the decree and forfeiture of the franchise would be futile, as it would require the erection of new works.[5] It is the duty of a city in its corporate capacity to enforce the terms of the contract as to the quality of the water to be supplied not only to the city but to private consumers. Pure water has been held to be water that is wholesome and ordinarily pure, and not pure in the chemical or abstract sense.[6]

A contract for artesian-well water is not satisfied by supplying water from other sources, although it may be equally good or better.[7]

Where the water furnished for the use of inhabitants is utterly unfit for domestic use or for use by domestic animals, and is so destructive to pipes and boiler-flues as to be unsafe for use for steam purposes, it is proper to enjoin the company from collecting water-rents for other purposes than the extinguishing of fires and the flushing of pipes and sewers.[8]

The fact that a water company, under its contract with a city, has the

[1] Galesburg *v.* Galesburg W. Co., 34 Fed. Rep. 675; Farmer's L. & T. Co. *v.* Galesburg, 133 U. S. 156.

[2] Burlington Water-works Co. *v.* Burlington, 43 Kan. 275; Wilson *v.* Charlotte (N. C.), 14 S. E. Rep. 961.

[3] Nicholasville W. Co. *v.* Board (Ky.), 36 S. W. Rep. 549; Port Jervis W. Co. *v.* Port Jervis (N. Y. App.), 45 N. E. Rep. 388.

[4] Illinois T. & Sav. Bank *v.* Arkansas City (C. C. A.), 76 Fed. Rep. 271.

[5] Burlington *v.* Burlington W. Co., 86 Ia. 266.

[6] Commissioners *v.* Towanda W.-w. Co. (Pa.), 15 Atl. Rep. 440 [1888]. *See* Palestine W. & P. Co. *v.* Palestine (Tex.), 41 S. W. Rep. 659; State Trust Co. *v.* Duluth (Minn.), 73 N. W. Rep. 249 [1897].

[7] Foster *v.* Joliet, 27 Fed. Rep 899.

[8] Brymer *v.* Butler Water Co. (Pa. Sup.), 33 Atl. Rep. 707; State Trust Co. *v.* Duluth (Minn.), 73 N. W. Rep. 249 [1897]; Brace *v.* Pa. Water Co., 7 Pa. Dist. Rep. 71 [1897]. *But see* Wilson *v.* Charlotte (N. C.), 14 S. E. Rep. 961; *and* Du Bois *v.* Du Bois W. Co. (Pa. Sup.), 35 Atl. Rep. 248.

right in case of fire to pump unfiltered water through its pipes, does not excuse it from its failure to filter the water at other times, according to the contract. The fact that a filter put in by the company was adequate when its works were constructed does not excuse it from putting in a new one after the old one has become inadequate by reason of the city's growth and the consequent increase in the demand for water.[1]

A contract between a city and a water company whereby the latter agrees to furnish water for the extinguishment of fires does not give a private person whose property is burned up through failure to furnish water any right of action against the company, since he is no party to the contract.[2] This is so even though the company has expressly agreed to be liable for damages for injuries caused by its failing to furnish water adequate to extinguish all fires.[3]

Under a contract to supply water in sufficient quantity and force to afford protection against fires, the pumps to be capable of working against a specified pressure when necessary for fire protection, and to be so arranged as to work singly or together as required, furnishing direct pressure, etc., the company is bound to take notice of such fires as it would be negligence not to know of in view of its opportunity of information and the nature of its business, no fomal demand for direct pressure being necessary. An acceptance by the city of mains smaller than the maximum size specified will not relieve the company from its obligation to supply the stipulated quantity and force of water.[4]

149. Public Character of Water Companies.—A water company which has been authorized by the state, through its legislature, to take water in which the public has rights and interests, and which has been authorized to occupy public streets and ways, is a *quasi*-public corporation,[5] and the operation of its water-works is a public one. Every inhabitant of the town along the lines of its pipes can obtain water if he desires it. The fact that the town does not use the water in its public buildings or to supply hydrants does not alter its public character.[6]

A company incorporated for the purpose of supplying a city and its inhabitants with water, and which by ordinance has been granted the privilege of laying its pipes through the streets, with no conditions imposed except that its pipes shall be laid in a certain manner, and that it shall in no case

[1] Burlington *v.* Burlington Water Co. (Ia.), 53 N. W. Rep. 246.

[2] House *v.* Houston W. Co. (Tex.), 22 S. W. Rep. 277; Mott *v.* Cherryvale W. & Mfg. Co. (Kan.), 28 Pac. Rep. 989; Bush *v.* Artesian Hot & Cold W. Co. (Idaho), 43 Pac. Rep. 69; Fitch *v.* Seymour W. Co. (Ind.), 37 N. E. Rep. 982; Akron W. Co. *v.* Brownless, 10 Ohio Cir. Ct. R. 620. *But, see contra*, Garrell *v.* Greensboro W.-supply Co. (N. C.), 32 S. E. Rep. 720 [1899].

[3] Howsmon *v.* Trenton W. Co. (Mo. Sup.), 24 S W. Rep. 784.

[4] Light, H. & W. Co. *v.* Jackson (Miss.), 19 So. Rep. 771.

[5] City W. Co. *v.* State (Tex.), 33 S. W. Rep. 259.

[6] Smith *v.* Inhabitants of Lincoln (Mass.), 49 N. E. Rep. 743 [1898].

charge more than a certain amount for water, must furnish water to any person on a street along which it has a pipe, though that pipe was laid for certain persons, who paid therefor under an agreement that if it was used for supplying water to any one else, it should be paid for by the company.[1]

The question whether an applicant for water living outside the city is within a reasonable distance from the main pipes is one for the courts, and cannot be determined by an arbitrary rule adopted by one party alone.[2]

150. Rules and Regulations of Water Company.—A water company must conduct its business in a manner that shall be equitable and just to its patrons. It cannot adopt and enforce unjust and unreasonable rules to the detriment of the public or to individual members of a community. There should be no discrimination. Parties requiring or desiring water should be governed by equitable and reasonable rules and requirements.

A rule that permitted the water commissioners to shut off the supply of water to a building when the occupant refuses to pay, at the rates fixed by their rules, for water used in excess of the quantity thereby allowed, has been held to be reasonable, when a contract exists between them and one who has been made aware of their rules by seeing the same printed on his bills. An injunction cannot be issued to restrain them from doing so.[3] A rule which requires water-rates to be paid quarterly, adds a penalty of five per cent in case of default of payment for ten days, and provides that after a default for fifteen days the water shall be shut off from the premises, has been held a reasonable regulation.[4]

Some states give liens against the house and lot for water-rents not paid.[5] Regulations, under such acts, which require the house-owner to pay the water-tax, instead of the tenant who uses the water, have been held reasonable.[6]

151. Regulation of Rates or Rents for Water.—The legislature may by enactment, or cities, if so empowered by it (or if such power has been reserved by a city in consideration of a right of way, etc.), may by ordinance fix the rates to be charged by water companies.[7] Such laws or ordinances have been held not unconstitutional in depriving the company of its property without due process of law, if the rates fixed be reasonable and allow a just compensation which may be inquired into by the court.[8]

When the rates have been fixed by the governing body of a municipality, it is within the province of the courts to review such action to the extent, at

[1] Haugen *v.* Albina L. & W.Co. (Oreg.), 28 Pac. Rep. 244.

[2] West Hartford *v.* Board (Conn.), 36 Atl. Rep. 786.

[3] Brass *v.* Rathbone, 153 N. Y. 435; Altoona *v.* Shellenberger, 6 Pa. Dist. Rep. 544 [1897].

[4] Tacoma Hotel Co. *v.* Tacoma L. & W. Co. (Wash.), 28 Pac. Rep. 516.

[5] Laws of Pennsylvania, Act May 22, 1889; Laws of Michigan 1869, Act No. 243.

[6] Kelsey *v.* Board Marquette (Mich.), 71 N. W. Rep. 589.

[7] San Diego W. Co. *v.* San Diego (Cal.), 50 Pac. Rep. 633, 693 [1897]; Bancroft *v.* Wall. (Com. Pl.), 6 Ohio Dec. 22.

[8] San Diego W. Co. *v.* San Diego (Cal.), 50 Pac. Rep. 633; Shaw *v.* San Diego W. Co. (Cal.), 50 Pac. Rep. 693; Brymer *v.* Butler W. Co. (Pa.), 36 Atl. Rep. 249.

least, of ascertaining whether the rates so fixed will furnish some reward for the property used and the services furnished.[1] However, an act that gives a court visitorial powers as to water companies, and provides that any customer may complain by petition of the charges for water, and which authorizes the court to determine the reasonableness of the charges and decree that they be decreased, does not give the court jurisdiction to prepare a general tariff of water-rates, and require companies to furnish water at such rates.[2]

On an issue as to the reasonableness of water-rates established by ordinance, the items of necessary expenditure by the water company should not include interest on the company's indebtedness, nor the sum the plant will depreciate annually, aside from the sum requisite for its maintenance and repairs. The value of the property which is necessarily used in furnishing the water is the basis for determining the reasonableness of rates, and not its liabilities. Their reasonableness cannot be determined in the absence of evidence of such value.[3]

The power of a water company, under its charter, to establish prices and rents to be paid for water, subject to the control of the legislature, does not deprive the court of its jurisdiction to adjudicate between it and a taker of water as to the reasonableness of a regulation. A regulation of a water company requiring takers of water to pay rent for the whole year, whether they actually use it for that length of time or not, and to make payment yearly in advance, without special agreement, is unreasonable and not binding.[4]

Violation of an injunction to restrain enforcement of unreasonable rules by a water company does not involve forfeiture of franchise, but a proceeding in contempt of court against the proper officer or employee of the company.[5]

If a person would avail himself of the unreasonableness of rules regulating the supplying of water, he should complain to the company of them.[6]

161. Ice and the Ice Industry.—In connection with the appropriation of water from watercourses to the many domestic and industrial uses to which it is put, not the least important is that of the appropriation of ice. It is less than a century (1805) since ice became a marketable product, when a Boston merchant named Tudor first conceived the idea of dealing in ice. In a few years the ice business had grown to such proportions that it was imported to foreign countries, American ice in 1833 having been transported as far as Calcutta. It is estimated in the Encyclopædia Britannica (vol. 12, p. 614) that in America more than two million tons of ice are annually harvested and stored by companies to supply the middle states. The city of New York is said to consume over five hundred thousand tons per year. Large quantities

[1] San Diego W. Co. *v.* San Diego, *supra.*

[2] Brymer *v.* Butler W. Co. (Pa. Sup.), 36 Atl. Rep. 249.

[3] Redlands Water Co. *v.* Redlands (Cal.), 53 Pac. Rep. 843 [1898].

[4] Rockland W. Co. *v.* Adams, 84 Me. 472.

[5] Newark *v.* Newark W. Co., 4 Ohio N. P. 341 [1897].

[6] Thomas *v.* Peterson (Tex.), 24 S. W. Rep. 1125.

of ice are also produced by artificial means by the evaporation of ammonia and other kindred processes. It is believed that, with the increased growth of cities and the many new uses and comforts obtained from ice, at the present day the quantities consumed are much larger.

162. Character of Property in Ice.—Ice, as the term is used, is water congealed, a solid, brittle substance formed by the freezing of waters by abstracting the heat necessary to preserve its fluidity. In water it has been shown that riparian owners have a limited and reasonable use; in the appropriation of it they must consider the wants and rights of lower riparian owners, being protected in the same manner from the extravagant use or wants of upper riparian owners. Water, being mobile in character, is not easily confined nor preserved. When this movable, wandering substance is congealed and becomes attached to the soil, it, like any other accession or accretion thereto, becomes a part of the realty. It does not differ materially from alluvion or accretion, which is but the imperceptible deposit or additions of earth, sand, gravel, and other matters made by rivers, flood, and other causes upon the land.[1] As Patterson, an English justice, has said in discussing the subject of accretions, "I am, however, of the opinion that where anything in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world. If water in a pool upon one's land be a part of the realty because fixed and stationary, why is it not when congealed over the bed of a stream to the thread of which his title extends? True, nature will in time, if it be not removed, again change the ice to fluid, and it will pass away from the possession; but not more certainly than the sweeping winds and the rising tide will sweep away the shifting sands."[2]

163. Real or Personal Property in Ice.—Ice when formed upon private waters or unnavigable streams has been held to be real estate, and the property of the owner of the soil over which it is formed.[3] It has been held an indictable offense to remove ice without the consent of the owner of the land over which it is formed.[4]

If ice be real property, the question arises whether it may be sold or rights granted to appropriate it without a deed, duly acknowledged and recorded, the same as is necessary in the conveyance of land. In general, every easement being an interest therein can be acquired only by grant or what is deemed to be evidence of an original grant. In this class of easements are embraced the right of one to take water, the soil, or parts of the soil of another, if such rights be of the freehold or inheritable character. In the matter of water, the owner of a stream may grant a certain quantity of water

[1] Angel on Watercourses, § 53; *Patterson, Justice, in* Blewett *v.* Tregonning, 3 Al. & El. 554.

[2] Blewett *v.* Tregonning, 3 Al. & El. 554.

[3] State *v.* Pottmeyer, 33 Ind. 402; Washington Ice Co. *v.* Shortall, 101 Ill. 46.

[4] State *v.* Pottmeyer, 33 Ind. 402; Bates *v.* State, 31 Ind. 72.

to be taken out of it or a certain amount of water-power, measured and ascertained.[1]

In Michigan ice has been held to be of such an ephemeral character as to render it incapable of any permanent or beneficial use as part of the soil, and that the sale of ice actually formed was a sale of personal property.[2] When cut and removed from where it was formed it is personal property in any case. The Michigan law is without doubt the exception to the general rule that ice formed upon a stream is real property. Ice cut and packed in an ice-house has been held the subject of larceny.[3]

164. Ice Formed on Navigable Streams.—Ice formed upon navigable streams does not as a rule belong to the adjacent owners of the land: certainly not in those states where such streams are held to be public property. The ice is held to belong to him who first appropriates it.[4]

Ice formed upon public waters is public property, and the person who first takes possession of it is entitled to it without interference. If disturbed, he may maintain an action of trespass against the parties who interfere with him. After ice-fields have been staked and fenced and scraped they have been held to become the property of the appropriator, and that an action would lie against any one who attempted to disturb the possession thereof.[5] When such an ice-field was injured by running a steamer back and forth unnecessarily near the boom inclosing it, it was held that an action for damages would lie.[6] One who is merely the owner of an easement in water has not the right to the ice formed on that water.[7] An appropriation of ice on a navigable stream is made by surveying, marking, and staking the ice which has not been appropriated by others, and by taking such steps as are necessary to preserve it. Such acts give sufficient possession to support an action of trespass.[8] At common law navigable waters are those in which the tide ebbed and flowed, and their ownership was limited to the high-water mark, except in those states where the law has been modified by statute or custom, as in the states of Maine and Massachusetts.[9]

In rivers above the ebb and flow of the tide, but navigable in fact, the authorities are not agreed. At common law a riparian owner had title in a stream to the center thereof, and this rule has been held to apply to such rivers as the Mississippi, Detroit, Delaware, Connecticut, Milwaukee, Sault Ste. Marie, Saginaw, Sandusky, and others.[10] In some states, as Iowa, North

[1] *See* Washburn's Real Property (3d Ed.), ch. 4, § 3. *See* Piper *v.* Connelly, 108 Ill. 646 [1884]; 109 Ill. 672; 115 Ill. 195; 120 Ill. 522.

[2] Higgins *v.* Kusterer, 41 Mich. 318.

[3] Ward *v.* People (N. Y.), 6 Hill 140.

[4] Briggs *v.* Knickerbocker Ice Co. (Sup.), 32 N. Y. Supp. 95.

[5] Woodman *v.* Pitman, 79 Me. 456. *And see* People's Ice Co. *v.* Steamer, 44 Mich. 229.

[6] People's Ice Co. *v.* Steamer, 44 Mich. 229.

[7] Brookville, etc., *v.* Butler, 91 Ind. 134. *But see, contra*, Mill River, etc., Co. *v.* Smith, 34 Conn. 462; Myer *v.* Whittaker (N. Y.), 55 How. Pr. 376.

[8] Hickey *v.* Hazard, 3 Mo. App. 480; Wood *v.* Fowler, 26 Kan. 682.

[9] Cooley on Torts 321.

[10] 9 Amer. & Eng. Ency. Law 858, *and cases cited.*

Carolina, Missouri, and Pennsylvania, the soil under navigable rivers, though not subject to ebb and flow of the tide, does not belong to the riparian owners, but to the state.[1] The United States Supreme Court has held to the same effect.[2]

If the bed of a stream of water, navigable or unnavigable, belongs to the riparian owner, the ice formed thereover belongs to him—and it may not be removed by another without his being liable in trespass, even though the removal of the ice improve the navigation. The ice of private fresh-water streams, the soil beneath which belongs exclusively to the riparian owner, is his, and he may enjoin others from removing it, or maintain an action of trespass against them.[3] The owner of the land on the side of a meandered stream has the right to cut all the ice which forms on that portion of the stream owned by him, and he may lease the privilege to another.[4]

Sometimes the right to take ice from navigable streams is made the subject of statute law. Under Laws of New York 1879 chap. 388, riparian owners on the Hudson River have title to the ice to the center of the channel, and it is provided that any person trespassing on or taking the same shall be liable for the value of the ice taken or for injury done to it. This, however, does not authorize an injunction against cutting or interfering with such ice, as the remedy given by the statute is exclusive.[5]

165. Ice Formed on Lakes and Ponds.—The right to gather ice upon natural lakes and ponds that are public waters is a common right.[6] The owner or lessee of land, including an ice-house, upon the shore of a lake or pond has the same right as others to cut and take ice, but he cannot exclude the public by occupying any particular part of the land.[7] When a lessee has marked and erected stakes he does not acquire such a right to the ice thus inclosed that he can exclude an ice company which, previous to the formation of the ice, had removed the lily-pads, scraped off the snow, bored holes in the ice, and let off the surface-water.[8]

166. Ice Formed on Artificial Ponds.—Ice formed upon an artificial pond in which another than the riparian owner has a right to the water belongs primarily to the riparian owner who owns the soil beneath the pond. He must not take ice in such quantities as will deprive the mill-owner of so much water as he is entitled to for the use of his mill.[9] If a mill-owner's

[1] 9 Amer. & Eng. Ency. Law 858, *and cases cited.*

[2] Barney *v.* Keokuk, 94 U. S. 324; Railroad Co. *v.* Shurmeir, 7 Wall. (U. S.) 272.

[3] Mills River, etc., *v.* Smith, 34 Conn. 462; State *v.* Pottmeyer, 30 Ind. 287; Lorman *v.* Benson, 8 Mich. 18; Paine *v.* Woods, 108 Mass. 160; Higgins *v.* Kusterer, 41 Mich. 318.

[4] Oliver *v.* Olmstead (Mich.), 70 N. W. Rep 1036.

[5] Briggs *v.* Knickerbocker Ice Co. (Sup.), 32 N. Y. Supp. 95.

[6] 9 Amer. & Eng. Ency. Law 859, *citing Massachusetts cases;* 12 Amer. & Eng. Ency. Law 626; Barrett *v.* Rockport Ice Co., 84 Me. 155.

[7] Hittinger *v.* Ames, 121 Mass. 539, Rowell *v.* Doyle, 131 Mass. 474.

[8] Barrett *v.* Rockport Ice Co., 84 Me. 155.

[9] Eidemiller Ice Co. *v.* Guthrie (Neb.), 60 N. W. Rep. 717; 12 Amer. & Eng. Ency. Law 626.

flowage or water-power is not lessened materially, he cannot sue a riparian owner for the removal of ice from the pond.[1] There are numerous cases which hold that the owner of an artificial mill-pond is entitled to the water of the pond, and is also entitled to the ice which is formed thereon, even as against the riparian owner. This, however, is but a repetition of what has just been said, and is no doubt true if the appropriation of the ice by the riparian owner materially diminishes or injures the water-power of the mill.[2] An owner of a mill, and a dam subservient thereto, who has wantonly drawn the water from a pond and thus injured the ice privileges of the owner of land bordering on the pond, was held liable in damages to such owner.[3]

167. Owners of Water and Ice are the Same.—In every case the right to take ice from a stream or body of water depends solely upon, and grows out of, the title to the bed of the stream and such right to the use of the waters as results therefrom. This is well settled by authority as well as by practice.[4] In some cases it is held that the title to the ice is in the person who was entitled to the use of the water before it was congealed.[5] The owner of a dam has no right unreasonably to detain the water, for the same reason that he has no right wantonly to accelerate it to the injury of the owner above or below.[6]

The property in ice on a pond or a canal depends upon the same rules and principles. If the state has appropriated the fee of the land for the construction of canals, the former owner has no exclusive right to take ice therefrom.[7] If the state has condemned and taken only a right of way, making it a servitude of the property of the original owner, the owner of the fee may take ice when its removal will not interfere with navigation or the use of the water for hydraulic or any other purposes for which it was taken.[8]

168. Travel upon Ice—Rights of Public.—In navigable streams the public has a common right of travel, and this extends to driving, yachting, and skating over the ice of such stream. Few cases have been decided by the courts upon this question, but there can be no doubt of the common-law right of the public to travel upon the ice of a navigable stream. Persons and companies engaged in the cutting and appropriating of ice must so protect their fields and the openings so made as not to expose to danger persons who

[1] Hazelton *v.* Webster (Sup.), 46 N. Y. Supp. 922 [1897]; Reysen *v.* Roate (Wis.), 66 N. W. Rep. 599; Searee *v.* Gardner (Pa.), 13 Atl. Rep. 835 [1888].

[2] Brookville & M., etc., Co. *v.* Butler, 91 Ind. 134; State *v.* Pottmeyer, 33 Ind. 402; Edgerton *v.* Hoff, 26 Ind. 35; Julian *v.* Woodsmall, 82 Ind. 568; Goodlittle *v.* Alker, 1 Burr. 133; Marshall *v.* Peters (N. Y.), 12 How. Pr. 218; Dodge *v.* Berry (N. Y.), 25 Alb. L. Jour. 303.

[3] Eidemiller Ice Co. *v.* Guthrie (Neb.), 60 N. W. Rep. 717; Stevens *v.* Kelley, 78 Me. 445.

[4] Gould on Waters, §§ 191 and 336; Piper *v.* Connolly, 108 Ill. 646; Ham *v.* Salem, 100 Mass. 350; Paine *v.* Woods, 108 Mass. 172.

[5] Elliot *v.* Fitchburg R. Co. (Mass.), 10 Cush. 191; Cummings *v.* Barrett (Mass.), 10 Cush. 186.

[6] Phillips *v.* Sherman, 64 Me. 171. *See* Frye *v.* Moore, 53 Me. 583.

[7] Cromie *v.* Board, 71 Ind. 208; Indianapolis, etc., *v.* Burkhart, 41 Ind. 364. *And see* Card *v.* McCaleb, 69 Ill. 314.

[8] Edgerton *v.* Hoff, 26 Ind. 35.

venture upon the ice. If a traveler is injured by an unguarded hole cut in the ice, without negligence on his part, he may recover from the persons who are responsible for the unguarded condition of the hole.[1]

Frozen, navigable rivers are public highways, and a traveler ordinarily has the right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such other uses as the frozen condition and surface of the river are adapted to. One such use is the harvesting of ice, a use that may impede travel. Both are common-law rights and both must be equally exercised, but both cannot be enjoyed at the same spot at the same time. It is reasonable, therefore, to give the choice to public benefit, and to restrict their uses to the narrower compass, but neither can monopolize the whole right to the destruction of all other rights.

If the public has appropriated a particular part of the ice of a stream or pond, and has worn a well-beaten track upon the same, it would be unreasonable for the ice-gatherer to obstruct such track; and if the ice-gatherer has appropriated and marked his ice-field, leaving the traveler room for passage, it would be unreasonable and unjust for the traveler to go upon it and defile it. Both uses of the ice are lawful, but neither may wholly exclude the other. Courts may declare the relative rights of persons, but they cannot extinguish them.[2]

169. Measure of Damages for Taking Ice.—The measure of damages for cutting and removing ice has been held to be the value of the ice as soon as it exists as a chattel; that is, as soon as it has been scraped, plowed, cut, severed, and is ready for removal,[3] and not with reference to the particular situation or convenience of one person or another.[4] The damages for destroying wantonly a field of forming ice is the profit that would have been made, deducting the expense of storing it from the market price.[5]

When riparian estates are taken away and the water rights pertaining thereto are destroyed, the value of the ice privileges connected therewith may be considered as an element of damages.[6]

[1] Woodman *v.* Pitman, 79 Me. 456; French *v.* Camp, 18 Me. 433.
[2] Woodman *v.* Pitman, 79 Me. 456.
[3] Washington Ice Co. *v.* Shortall, 101 Ill. 46.
[4] Piper *v.* Connolly, 108 Ill. 646.
[5] People's Ice Co. *v.* Steamer, 44 Mich. 229.
[6] Ham *v.* Salem, 100 Mass. 350; Paine *v.* Woods, 108 Mass. 173; Cromie *v.* Board, 71 Ind. 208; Card *v.* McCaleb, 69 Ill. 314. *And see* Indianapolis Waterworks *v.* Burkhart, 41 Ind. 364.

CHAPTER XI.

WATER. RIGHTS IN REGARD TO SURFACE-WATERS.

171. Surface-waters Defined.—"Surface-waters are waters of a casual and vagrant character which ooze through the soil or diffuse or lose themselves over the surface, following no definite course." Though usual and natural, flowing in a known direction and course, they have nevertheless no banks or channels. They include waters which are diffused over the surface of the ground, and are derived from rains, melting snows, occasional outbursts of water which in time of freshet descend from the mountains and inundate the country, and the moisture of wet, spongy, springy, and boggy grounds. When surface-waters reach and become a part of a natural watercourse they lose their character as surface-waters, and then come under the rules governing watercourses.[1]

Surface-waters have been described as water which comes from no one knows exactly whence, and flows no one knows exactly how, through or under ground or on the surface, unconfined in any channel, either as rainfall which may fall from day to day, or springs that come from beneath the surface, in a direction which no one knows.[2] Natural depressions in the land through which surface-waters from adjoining lands naturally flow are not watercourses.

172. Surface-waters Distinguished from Watercourses.—The determination of the character of waters is often important, as the laws governing their use, disposition, and appropriation often depend upon their character. This is especially true of surface-waters, as distinguished from watercourses, in the liability of landowners for damages due to their action or to their drainage, diversion, and detention, as will be seen in the sections which follow.

A slough or bayou extending at right angles to the river, and about one hundred and fifty feet wide at the river, having a well-defined channel, and banks for a distance of from four to six hundred feet and no more, not shown to be formed by any living springs, but in high waters to have an outlet into the river through its defined channel for the distance stated, and spreading through forests and over the surrounding country without any defined

[1] 24 Amer. & Eng. Ency. Law 896, *and cases cited.*

Gd. Junc. C. Co *v.* Shugar, L. R. 6 Ch. 486.

channel, was held not to be a natural watercourse, and the construction of a solid embankment across it at its junction with the river was not to be enjoined.[1]

Water gathered in a reservoir formed by the bed of a creek and the construction of streets across it, where the bed of the creek has long since been abandoned and streets, roads, railroad-tracks, and buildings have been constructed across it in places, is to be regarded as surface-water.[2]

A lake formed by several streams whose waters in times of flood find an outlet by percolation through a bed of gravel so rapidly that there is an apparent current towards the gravel-bed is a watercourse, and not merely surface-water.[3] Water which is mere surface-water from rain or melted snow, flowing in hollows and ravines of land, which are at no time destitute of water, is usually held not a watercourse. If, however, such ravines and gorges have a well-defined channel which the water has made for itself, and which is the accustomed channel through which it flows, such channel is held a watercourse. Whether or not such a pass for water is a watercourse is a question to be determined by a jury under proper instructions from the court.[4]

Where the law provided that an occupier of any land covered with water shall be assessed at one fourth of the amount to be imposed on other property, it was held that canals and filter-beds, the latter supported on brick arches and covered with water at times, were lands covered with water.[5]

172a. Watercourse Defined and Distinguished. — A watercourse is a stream of water flowing in a defined channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. According to Mr. Angel in his book on Watercourses,[6] a watercourse consists of a bed, banks, and water, though the water need not flow continually, as there are many watercourses which are sometimes dry. He distinguishes between regular flowing streams of water which at certain seasons are dried up, and waters which in times of freshets or as melted ice descend from the hills and inundate the country. To maintain a right to a watercourse or brook it must appear that the water usually flows in a certain direction and by a regular channel with sides or banks. It need not flow continually, and may at times be dried up. It must have a well-defined and substantial existence. The mere right of drainage over the general surface of land is very different from the right of the flow of a stream or brook.[7]

The word "watercourse" is applied to all the inland waters which are

[1] St. Louis, etc., R. Co. *v.* Schneider, 30 Mo. App. 620.
[2] Kansas City *v.* Swope, 79 Mo. 446.
[3] Hebron G. Rd. Co. *v.* Harvey, 90 Ind. 192.
[4] Eulrich *v.* Richter, 37 Wis. 230.
[5] East London W.-w. Co. *v.* Leyton Sewer Auth. (Eng.), L. R. 6 Q. B. 669 [1871].
[6] Angel on Watercourses, 7th ed., § 4.
[7] Hoyt *v.* Hudson, 27 Wis. 656; 28 Amer. & Eng. Ency. Law 944, *and cases cited.*

commonly called rivers, brooks, creeks, rivulets, etc., according to their magnitude. As defined in law, "watercourse" means a living stream with banks and channels, not necessarily running at all times, but coming from more permanent sources than mere surface-waters.[1] A river is a considerable stream of water with a current of its own, flowing from a higher level, its source, to its mouth.[2] It is a watercourse from the point where the water comes to the surface and begins to flow in a well-defined channel until it mixes with the water of the sea, lake, or other body of water into which it flows.[3]

To constitute a watercourse it is not necessary that there should be spring-water.[4] But where water, owing to hills and mountains, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long gullies or ravines, carving a distinct and well-defined channel, and which bears unmistakable signs of the action of running water, and in which channels the stream has flowed from time immemorial, it will be considered a watercourse.[5]

A ditch excavated for the purpose of diverting the water from its natural channel, or to carry it from low lands from which it will not flow in consequence of the natural formation of the surrounding land, may be a watercourse.[6] In Wisconsin it has been held that surface or percolating water gathered into a ditch and led away does not make a watercourse.[7]

A body of water five miles long by one mile wide, fed by springs which had no current or connection with any other stream except that, during a portion of the year, water flowed from it to the Illinois River by way of a slough, and it did not appear whether or not it was navigable, was held a lake or pond, and that therefore in Illinois adjoining owners took only to water's edge.[8]

The fact that a stream may spread out, making a piece of marshy ground where the flow is not sufficient to break the turf, does not destroy its character as a watercourse.[9] If there be characteristics of a flowing stream with visible

[1] Joliet, etc., R. Co. *v.* Healy, 94 Ill. 416; Gillett *v.* Johnson, 30 Conn. 180; Hill *v.* Cincinnati, etc., Ry. Co. (Ind.), 10 N. E. Rep. 410 [1887]; Morrisey *v.* Chicago, etc., Ry. Co. (Neb.), 56 N. W. Rep. 946; Pyle *v.* Richards, 17 Neb. 180.

[2] The Garden City, 26 Fed. Rep. 766.

[3] Dudden *v.* Clutton Union, 1 H. & N. 627; Jeffers *v.* Jeffers, 107 N. Y. 651; Hinkle *v.* Avery (Ia.), 55 N. W. Rep. 77; Razzo *v.* Varni (Cal.), 22 Pac. Rep. 848; New York C. & St. L. R. Co. *v.* Speelman (Ind. App.), 40 N. E. Rep. 541; Hill *v.* Cincinnati, etc., Ry. Co. (Ind.), 10 N. E. Rep. 410 [1887]; Ne-Pee-Nauk Club *v.* Wilson (Wis.), 71 N. W. Rep. 661.

[4] Kelly *v.* Dunning, 39 N. J. Eq. 482; Eulrich *v.* Richter, 41 Wis. 320.

[5] 28 Amer. & Eng. Ency. Law 946, *and cases cited.*

[6] Earl *v.* DeHart, 12 N. J. Eq. 280. *See* McKinley *v.* Chosen Freeholders, 29 N. J. Eq. 171; Bowlsby *v.* Speer, 31 N. J. L. 351.

[7] Case *v.* Hoffman (Wis.), 72 N. W. Rep. 390 [1897]. *But see contra*, Cross *v.* Kitts (Cal.), 22 The Reptr. 361 [1886].

[8] Trustees *v.* Schroll (Ill.), 12 N. E. Rep. 243 [1887].

[9] Gillett *v.* Johnson, 30 Conn. 180; Hinkley *v.* Avery (Ia.), 55 N. W. Rep. 77; Mitchell *v.* Bain (Ind. Sup.), 42 N. E. Rep. 230; Macomber *v.* Godfrey, 108 Mass. 219 [1871]; Rigney *v.* Tacoma Lt. & W. Co. (Wash.), 38 Pac. Rep. 147.

current, it is a watercourse;[1] otherwise it is not.[2]

The fact that a stream having a bed, banks, and current has been deepened artificially for drainage purposes, or that it is at times dry, does not deprive it of the character of a watercourse.[3] Depressions in the ground to which surface-water from adjacent land finds its way and is discharged into some natural outlet, are not watercourses.[4] A ravine upon which grasses grow and hay is cut, through which surface-water is discharged during a portion of the year, or during rains or when snow melts, but which has not a bank, is not a watercourse.[5] A small stream passing through a city in an adverse course, collecting foul matter from dwellings and manufactories and which is therefore prejudicial to health and comfort, is not a natural watercourse in which people have such rights as to prevent the city from changing the course of such stream and conducting it in a covered culvert.[6] A sluiceway between the piers of a bridge extending above, below, and between the filling by which flats have been reclaimed, but which has no water in it at low tide, is not a watercourse which can be the basis of riparian rights.[7]

A stream of water which is not susceptible of use as a highway in its natural state, is absolutely private and, though made capable of floating commercial products by artificial means, is not a subject of public use.[8] * If such streams are sufficiently large to be of public use in transporting property, they are highways over which the public has a common right.[9]

If the water takes a defined course, as from a spring, and makes a defined channel, it is a watercourse, whatever its size or length.[10] A creek one-half mile long, with a defined bed and banks over which water is conveyed and discharged into lowlands adjacent to the running stream, is a watercourse, though it be dry most of the time.[11] However small, it is a watercourse from its source, if that source be a spring; and the owner of the land on which it rises cannot monopolize all the waters at its source so as to prevent their reaching the land of other proprietors lower down.[12] The fact that a creek or outlet from a lake spreads out into a body of water does not make it a stream

[1] Hinkle *v.* Avery (Ia.), 55 N. W. Rep. 77.

[2] Case *v.* Hoffman (Wis.), 72 N. W. Rep. 390 [1897]. *See* Ne-Pee-Nauk Club *v.* Wilson (Wis.), 71 N. W. Rep. 661.

[3] Rigney *v.* Tacoma Light & Water Co. (Wash.), 38 Pac. Rep. 147. *And see* Brady *v.* Hayward (Mich.), 72 N. W. Rep. 233 [1897].

[4] Barkley *v.* Wilcox, 86 N. Y. 140; Chicago, etc., Railroad Co. *v.* Morrow, 42 Kan. 339; Trustees *v.* Schroll (Ill.), 12 N. E. Rep. 243 [1887].

[5] Shields *v.* Arndt, 4 N. J. Eq. 246; Wagner *v.* L. I. R. Co. (N. Y.), 5 Thomp. & C. 163. *And see* Hoyt *v.* Hudson, 27 Wis. 656.

[6] Murphy *v.* Wilmington, 5 Del. Ch. 281.

[7] Chamberlain *v.* Hemmingway (Conn.), 22 Law Rep. Ann. 45.

[8] Wadsworth *v.* Smith, 11 Me. 278; Hubbard *v.* Bell, 54 Ill. 121.

[9] Palmer *v.* Mulligan (N. Y.), 3 Cai. 307; Hooker *v.* Cummings (N. Y.), 20 Johns. 90.

[10] Van Orsdal *v.* Burlington, etc., R. Co., 56 Iowa 470; Union Pac. R. Co. *v.* Dyche, 31 Kan. 120; Pyle *v.* Richards, 17 Neb. 180; Chauvet *v.* Hill, 93 Cal. 407.

[11] Ferris *v.* Wellborn, 64 Miss. 29.

[12] Dudden *v.* Clutton Union, 1 H. & N. 627; Wood *v.* Wand, 3 Exch. 748; Chauvet *v.* Hill (Cal.), 28 Pac. Rep. 1066.

* *See* Secs. 231–250, *infra*.

of a different character. It is still a stream if there is a set and uniform current.[1] Its character is not lost though it for a time spreads out over a meadow or is lost in a swamp or lake, if it emerges therefrom and can be identified as the same stream.

173. Overflow of Watercourses.—Waters which have overflowed the banks of a stream in times of freshet because of the insufficiency of the natural channel, are surface-waters within the meaning and rules of law relative to such waters.[2] The moment, however, such waters return to the channel they are not surface-waters. Water which seeps through an embankment or levee is deemed surface-water, and is governed by the laws applicable to surface-waters.

It is difficult to distinguish between the surface-water coming from the clouds and that which rises in a spring, especially in the case where the surface-water comes from the mountains, a thousand miles from where the overflow of the river occurs, occasioned as it is, not by rains or snows in its vicinity, but by the melting of snows upon the mountains and by the accession of a thousand tributary streams. It has been held that the overflow of the Missouri River is what in law is termed surface-water.[3]

The waters of a stream which, during the rainy season, was so swollen by the freshets that it flowed in high-water channels, having well-defined beds and banks, are not surface-waters against which a railroad company may place solid embankments across the high-water channels.[4] Where surface-water habitually flows off over a fixed and determinate course, having reasonable limits as to width, so as to be uniformly discharged at a definite point, though without having worn out a channel having definite and well-marked banks, the line of flow is a watercourse within the meaning of Revised Statutes, which declare that owners of land may drain the same "into any natural watercourse."[5] The flood-water of the Nemaha River is held not to be surface-water, but a constituent part of such stream—a natural watercourse.[6]

Water which in flood-time leaves the channel of a well-defined river and overflows adjoining lowlands, the current of the river widening to the whole width of the water, has been held not surface-water so as to relieve a railroad company from liability for its obstruction.[7]

[1] State *v.* Gilmarton, 14 N. H. 467; Hinkle *v.* Avery (Iowa), 55 N. W. Rep. 77.

[2] 24 Amer. & Eng. Ency. Law 903; Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237 [1879]; Jean *v.* Penna. Co. (Ind. App.), 36 N. E. Rep. 159; Cass *v.* Dicks (Wash.), 44 Pac. Rep. 113; Mo. Pac. Ry. Co. *v.* Keys (Kan.), 40 Pac. Rep. 275; New York, etc., R. Co. *v.* Speelman (Ind. App.), 40 N. E. Rep. 541. *But see* Crawford *v.* Rambo, 44 Ohio St. 282, *contra, and* Moore *v.* Chicago, etc., Ry. Co. (Ia.), 39 N. W. Rep. 390 [1888].

[3] Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237 [1879]; Kauffman *v.* Greisemer, 26 Pa. St. 408.

[4] New York, C. & St. L. R. Co. *v.* Hamlet Hay Co. (Ind.), 47 N. E. Rep. 1060 [1897].

[5] Lambert *v.* Alcorn (Ill. Sup.), 33 N. E. Rep. 53.

[6] Chicago, B. & Q. R. Co. *v.* Emmert, 73 N. W. Rep. 540.

[7] Moore *v.* Chicago, B. & Q. R. Co. (Iowa), 39 N. W. Rep. 390 [1888]. *Following* Sullens *v.* Railway Co., 38 N. W. Rep. 545.

174. Property in Surface-waters.—Surface-water, as well as percolating water, is owned by the person or party who owns the property upon which it lies or through which it passes. Wild water that flows upon the surface of the earth, or temporarily flows over it as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the overflowing of contiguous streams or rivers, is absolutely the property of the owner of the land as much as the land itself. Such waters are not in a watercourse or in a multitude of minute watercourses, but in the eye of the law they are the moisture and a part of the soil with which it mingles, and the person who owns the soil may apply all that is found therein to his own purposes and at his own free will.[1]

175. Obstruction and Repulsion of Surface-waters.—The law governing the obstruction and repulsion of surface-waters is in a very unsatisfactory condition, and it arises from the adoption of two rules—one, known as the *civil-law* rule, which subjects the lower estate to an easement or servitude of receiving the flow of surface-waters from the upper estate, and another which is known as the *common-law* rule, which permits the lower proprietor to do as he pleases with his land and to receive or repel or divert surface-waters flowing upon his land as he pleases. One or two states seem to have adopted a modified rule, depending upon the circumstances of the case and the reasonableness of the use of the lower estate. In those states which have adopted the civil-law rule the lower estate is necessarily subject to the natural flow of the surface-water from the upper one. The owner of the lower land has no right to erect embankments and prevent the natural flow of the water from the higher ground, nor has the owner of the higher ground a right to make excavations from drains and divert the water from its natural channel to the new channel made on the lower ground; nor can the owner of the higher land collect into one channel waters usually flowing off his neighbor's land by several channels, and thus increase the flow upon the lower estate. The owner of the higher land, when good farming requires it, may cover up and conceal drains through his own land if he keep the place of discharge unchanged. The civil law created an easement or servitude and drainage over lower lands and waters from the necessity of affording an escape for the flow of surface-waters. The rule does not apply to the overflowing of waters from large streams in times of flood, and the owners of land along such streams may construct levees or embankments to protect their lands from flood-waters, even though the effect be to prevent the full passage of such flood-waters in as large and full a manner as they would otherwise pass, and even though they increase the flow of flood-water upon lands not similarly protected. If the owner of higher land is subject to overflow, he may protect himself in the same manner by erecting levees or embankments,

[1] 24 Amer. & Eng. Ency. Law 906.

even though it increases the flood-waters on higher lands bounding upon the river.

The seepage through a levee or embankment in time of flood is surface-water, and the lower proprietor is bound to permit it to flow through his lands in the same manner as surface-water usually flows over them.[1]

176. Different Laws in Different States.—The principles of the civil law have been adopted in Alabama, California, Georgia, Illinois, Pennsylvania, and Tennessee. The laws of Iowa, Kentucky, Louisiana, Maryland, Michigan, Nevada, North Carolina, and Ohio have a leaning towards the civil-law rules. North and South Dakota and Oregon do not appear to have decided the question whether the civil- or common-law rules shall be applied.

In some states the courts distinguish between city and country property, and the opinion has been expressed that the civil law does not apply to city and village lots.[2]

The common-law doctrine is recognized and followed in England and in the states of Connecticut, Indiana, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, South Carolina, Texas, Vermont, Washington, and Wisconsin.[3] Arkansas has adopted what seems to be a modified rule, under which the right to obstruct surface-water depends upon whether the obstruction is the necessary result of the reasonable use of the land. If it be reasonably necessary to obstruct or divert the natural flow of surface-water, the right may be exercised if it be done with proper regard for the welfare and rights of adjoining owners.[4] A justice of a Missouri court[5] has characterized the common-law rule as the doctrine of *sauve qui peut*, popularly known as that of "the devil take the hindermost." To an engineer it would seem he had divulged the real grounds of the contention when he said: "Nor do we think that equitable and just principles, as we understand it, will materially retard agricultural operations or improvements. The facts in the present case show that the defendant could have built a rock culvert at the crossing of this hollow at about the same cost as the dirt embankment. The engineer seems to have been misled by the dry and rich soil, which extended to the very bottom or the lowest part of the swale, portions of which were in cultivation; and although the road was equally strong and safe with a rock culvert or a dirt embankment, the engineer preferred the latter, as 'not so liable to wash out when floods came, and that driftwood and other débris fill the culvert and injure it or the bank adjoining it.'" Without doubt in agricultural districts the civil-law rule is most equitable, but in cities and districts where large and expensive improvements are undertaken the common-law rule is

[1] 24 Amer. & Eng. Ency. Law 907–911.
[2] 24 Amer. & Eng. Ency. Law 915.
[3] Walker *v.* New Mexico, etc., R. Co., 17 Sup. Ct. Rep. 421. *See* Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237 [1879], *and many cases reviewed and cited.*
[4] 24 Amer. & Eng. Ency. Law 923.
[5] Justice Lawrence in Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237 [1879].

more equitable and is better calculated to encourage the development and fulfillment of engineering and architectural enterprises.

177. Improvements on Land under the Common and Civil Law Rules.—The common-law doctrine holds that the owner of land has the right to occupy and improve it in such a manner and for such purposes as he sees fit, either by altering the conditions of the surface or by the erection of buildings or other structures, and that such right is not restricted or modified by the fact that his land is so situated with reference to that of adjoining owners that the alteration in the mode of its improvement or occupation will cause surface-water to stand in unusual quantities on adjacent lands, or prevent such waters from passing onto and over such lands in greater quantities and in different direction than they are accustomed to flow.[1] The common-law rule is founded upon the principle that a property owner has a right to the free and unfettered control of his own land both upon and beneath the surface, and that it cannot be interfered with or restrained by any considerations of injury to other lands which may be occasioned by the flow of mere surface-water.

It is held not material in the application of this principle of law whether a party obstructs or changes the direction and flow of surface-waters. He may prevent it from getting within the limits of his land, or may erect barriers or change the level of the soil so as to turn it off into new courses after it has come within his boundaries. Under the common law the obstruction of surface-water or an alteration in the flow of it affords no cause of action on behalf of the person who may suffer loss or detriment therefrom, as against one who does no act inconsistent with the due exercise of dominion over his own soil.[2]

The doctrine of the common law is that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface-water, or such as falls or accumulates by rain or the melting of snow, and that the proprietor of the inferior or lower tenement or estate may, if he chooses, lawfully obstruct or hinder the natural flow of such water therein, and in so doing may turn the same back upon, or off onto or over, the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion.[3]

178. Drainage of Surface-waters.—It is well established that the natural flow of surface-waters from higher to lower grounds will not give a cause of action. In the clearing, improvement, and preparation of land for cultivation, the owner may, in the exercise of good husbandry, drain his soil, although the consequences are that the surface-waters flow from his land with greater rapidity and in greater quantities upon the lower land.[4]

[1] Gannon *v.* Hargadon, 10 Allen 106, Bigelow, J.

[2] 24 Amer. & Eng. Ency. Law 917.

[3] Ch. Justice Dixon in Hoyt *v.* Hudson, 27 Wis. 656; Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237 [1879]; Johnson *v.* Chicago, etc., Ry. Co. (Wis.), 50 N. W. Rep. 771.

[4] Meixell *v.* Morgan (Pa.), 24 Atl. Rep. 216; 24 Amer. & Eng. Ency. Law 926.

In the reasonable use of one's land one may fill up sag-holes, pools, and basins so that water shall not accumulate or stay in them, even though the flow upon his neighbor's land is increased. The drainage should be maintained in the direction in which it naturally flows, and it should not bet collected into a ditch or drained and discharged in large volume upon lower lands.[1]

The owner may make such ditches or drains for agricultural purposes on his own land as may be required by good husbandry, although by so doing the flow of water may be increased in the natural channel which carries the water from the upper to the lower field.[2] Substituting an underground tile-drain for natural surface drainage over the same land is not an abandonment of the natural watercourse.[3]

Injunction will not issue to restrain the discharge of water into a drain leading to the land of the servient owner, when it does not appear that the owner is injured by the substitution of a tile-drain for the natural surface drainage.[4]

The defendant must not, by artificial channels, discharge an unnatural quantity of water upon the plaintiff's land. If by reason of negligence in not keeping the channel open and conducting the water, as it had formerly done, away from the plaintiff, upon its own land, it is liable. When a corporation or individual attempts by artificial means to interfere with the natural action of water to serve its or his own purposes, he must see to it that it shall be done in such a way as shall not unnecessarily do an injury to his neighbor.[5]

The owner of land adjoining a highway has no right to drain his land into a ditch in such highway by means of a drain which carries the water in a different direction from its natural flow.[6]

In an action for damages for injuries for the unreasonable discharge of surface-waters upon the lands of another, it is no defense that the lower land-owner may have protected his lands and have avoided the damages by making proper improvements. All of the states hold the owner of land liable in damages who collects water in a body and casts it upon the lower premises to their injury. The unlawful discharge of the waters must have caused appreciable damages.[7]

[1] Many cases in 24 Amer. & Eng. Ency. Law 928. *See* Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237 [1879]; Goodale *v.* Tuttle, 29 N. Y. 459.

[2] Ribordy *v.* Murray, 70 Ill. App. 527.

[3] Lambert *v.* Alcorn (Ill. Sup.), 33 N. E. Rep. 53.

[4] Resser *v.* Davis (Iowa), 69 N. W. Rep. 524.

[5] Mitchell *v.* New York, L. E. & W. R. Co., 36 Hun 177 [1885].

[6] Davis *v.* Commissioners (Ill. Sup.), 33 N. E. Rep. 58.

[7] 24 Amer. & Eng. Ency. Law 931; Mitchell *v.* New York, etc., R. Co., 36 Hun (N. Y.) 177 [1885]; Mitchell *v.* Bain (Ind.), 42 N. E. Rep. 230; Jacobson *v.* Van Boening (Neb.), 66 N. W. Rep. 993; Fremont, etc., R. Co. *v.* Marley (Neb.), 40 N. W. Rep. 948 [1889], 25 Neb. 138; Resser *v.* Davis (Iowa), 69 N. W. Rep. 524; Lincoln St. Ry. Co. *v.* Adams (Neb.), 60 N. W. Rep. 83; Drew *v.* Hicks (Cal.), 35 Pac. Rep. 563. *And see* Missouri, K. & T. Ry. Co. *v.* Bishop (Tex.), 34 S. W. Rep. 323.

The county or state, upon making just compensation to the parties injured, may, in constructing a highway, divert waters in a manner which could not be undertaken by an individual.[1] The owner of a swamp, which is the natural place of deposit of surface-water, cannot complain because the city deposits such waters in the swamp by storm-sewers after the swamp has been improved.[2]

179. Drainage of Ponds, Stagnant Bodies, etc.—When surface-waters reach and become a part of a permanent body of water contained in a natural basin and forming a lake or pond, but having no outlet, and it is situated on he lands of two or more persons, they lose their character as surface-waters, and are governed by laws applicable to watercourses. A pond of surface-water may not be drained upon the lands of a neighbor where water would not otherwise go.[3]

If a pond have no outlet except by percolation and evaporation, it is a burden to the estate upon which it is situated, unless the owner can drain it without injury to others. It has even been held that a landowner could not cut through a ridge situated upon his own land and discharge a swamp upon his own land, if such waters by percolation into his land were transmitted upon his neighbor's land to his injury.[4]

Yet it has been frequently held that where natural ponds are merely the collection of surface-waters from rain or melting snow, and where there is such a descending grade that by filling up the ponds with dirt there would be a flow of water toward and into lower lands, such ponds may for the purposes of husbandry be drained by either tile or other drains into any natural watercourse existing upon the superior estate and which flows over the lower estate, though the flow of water be increased. This would not permit the upper property owner to drain a large body of water upon the lower land of his neighbor to its serious injury. A landowner may drain surface-water directly into an adjoining pond if it formerly flowed there naturally over the surface.[5]

The owner of a marsh or swamp having a natural outlet to a lake cannot drain the marsh by means of a ditch dug in such manner as to drain off the waters of the lake.[6]

180. Water from Roofs.—This is an important subject to the architect or engineer in designing and erecting structures. Rain-water and melting snow may not fall from the roof of a building upon a neighbor's premises, either from the eaves or by collecting it in gutters or eaves-troughs, and then turning it in a body upon the adjoining lands. If a building is erected so

[1] Churchill *v.* Beethe (Neb.), 66 N. W. Rep. 992.

[2] St. Paul & D. R. Co. *v.* City of Duluth (Minn.). 58 N. W. Rep. 159.

[3] Davis *v.* Londgreen, 8 Neb. 43.

[4] Vernum *v.* Wheeler (N. Y.), 35 Hun 53. *And see* Mitchell *v.* N. Y. L. E. & W. R. Co., 36 Hun 177; Anderson *v.* Henderson (Ill.), 16 N. E. Rep. 232 [1888].

[5] Hoester *v.* Hemsath, 16 Mo. App. 485. *See* Rath *v.* Zimbleman (Neb.), 68 N. W. Rep. 488.

[6] Bennett *v.* Murtaugh, 20 Minn. 151.

that the eaves project over neighboring land, or so that they touch a neighbor's wall, and injury results, the owner of the building causing such injury will be liable in damages.[1] When a slanting roof was built so close to the boundary-line that in heavy storms the water was thrown over the line onto the building-wall of the neighbor, softening and destroying the mortar between the stones to such an extent as to weaken the wall, it was held that the owner of the roof was liable for the damage.[2] The right to flood the land of another, whether from the dripping from the roof of a building or otherwise, is an interest in the land, and a parole license or agreement giving such right is within the statute of frauds, and void. Such a license is revocable at any time; it should be granted by deed.[3]

181. Eaves-troughs, Gutters, and Conductors.—Where the eaves of a building project over the boundary-line, and the neighbor, in erecting a wall for a building, saws them off to make room for his wall, and while in this condition a storm occurs which throws large quantities of water upon the wall to its injury, still the owner of the building causing the injury is liable for the damages, and the fact that the eaves of the projecting roof had been provided with a trough to carry away the water from the roof will not relieve him from damages.[4] Buildings must be provided with proper eaves-troughs or gutters, and these must be kept in proper repair to relieve their owner from damages arising from injury to his neighbor. If gutters or eaves-troughs have been constructed and of sufficient capacity to carry off such rains as may reasonably be expected, there will be no liability for injuries caused by extraordinary rains, such as experience and prudent foresight would not have guarded against.[5] Ordinary rains have been defined as all usual and always-to-be-expected rains in various seasons of each year, and "extraordinary rains" as those that do not recur nor are reasonably to be expected yearly.[6]

It is no excuse for one who has permitted water from his roof to be discharged against the wall of another's building to its injury, that if the said wall had been well built no damage would have been sustained.[5] If the land of two property owners be divided by a party-wall, and its height has been increased by one owner, and a roof erected in such a manner as to turn water upon his neighbor's roof below, and large icycles are formed on the wall as it is carried up, which overhang the neighbor's building and, being detached, fall upon the roof and injure it, he will be held liable for the injuries, and may be restrained from continuing such a nuisance by injunction.[7]

It is not necessary that injury be suffered by the one upon whose roof water is unlawfully discharged. The defendant is entitled to nominal

[1] Tanner *v.* Valentine, 75 Ill.624 [1874].
[2] Copper *v.* Dolvin, 68 Ia. 757; *accord*, Martin *v.* Simpson (Mass.), 6 Allen 102.
[3] Tanner *v.* Valentine, 75 Ill. 624 [1874]: Stout *v.* McAdams, 2 Scam. 67; Nevins *v.* Peoria, 41 Ill. 502; City of Aurora *v.* Reed, 57 Ill. 30.
[4] Copper *v.* Dolvin, 68 Ia. 757.
[5] Gould *v.* McKenna, 86 Pa. St. 297.
[6] Meister *v.* Lang, 28 Ill. App. 624.
[7] Brooks *v.* Curtis (N. Y.), 4 Lans. 287.

damages, at least for the invasion of his rights.[1] The projection of eaves over the boundary-line of one's neighbor is a nuisance for which damages will be awarded without any proof of special damages.[2]

182. Discharge of Roof-waters, Snow, and Ice into Street.—Buildings in villages or cities which are erected on or close to the line of the street must be so designed and erected that snow and ice falling from the roof shall not be precipitated upon persons lawfully using the streets. The roof of the building so constructed as to permit snow to fall into the street is, in the judgment of the law, a nuisance, and the owner liable to persons injured by falling snow or ice.[3] A tenant of such a building may be liable if by the use of ordinary care the accident could have been prevented.[4]

The liability for the consequence of rain dripping from the roof has been held not absolute, but to exist only when the injury arises from some fault or neglect of duty.[5]

Roof-water may be collected and discharged from a water-spout into an alley at grade, without being liable for the flooding it occasions to adjoining lands which are not protected against the grade of the alley.[6]

183. Easement of Eaves-drip.—The right to discharge water from roofs upon adjoining lands may be acquired by continued adverse use for the prescriptive or statutory period, but an easement of eaves-drip will not justify the erection of troughs and spouts to collect the rain-water and discharge it upon land in a stream.[7] When one has acquired an easement for the drip of his eaves, it has been held that the raising of the roof to a greater height did not destroy his right if the adjoining land was not subjected to any greater burden by the alteration.[8]

Where two buildings are so situated that the water from the roof of one can only be prevented from flowing against and injuring the other by an eaves-trough attached to both, though the consent and cooperation of the owner of the building receiving the injury may be necessary, yet the duty of affirmative action is on the owner of the building which causes the injury, and he may not lie by and see the water from his roof destroy his neighbor's wall, and rely for his protection upon the passiveness of his neighbor.[9] The defendant may be held liable whether he was responsible for all or only a part of the injury.[10]

The respective duties which adjoining proprietors mutually improving their property in a town owe to one another are those only which the

[1] Hooten *v.* Barnard, 137 Mass. 36.
[2] Fay *v.* Prentice (Eng.), 1 C. B. 838.
[3] 24 Amer. & Eng. Ency. Law 941.
[4] Clifford *v.* Atl. Cot. M., 146 Mass. 47.
[5] Barry *v.* Peterson, 48 Mich. 263; Chandler *v.* Lazarus (Ark.), 18 S. W. Rep. 181.
[6] Phillips *v.* Waterhouse (Iowa), 22 The Reptr. 330.
[7] Reynolds *v.* Clark, 2 Ld. Raym. 1399. Grace M. E. Church *v.* Dobbins (Pa; Sup.), 25 Atl. Rep. 1120.
[8] Harvey *v.* Walters, L. R. 8 C. P. 162; Thomas *v.* Thomas, 2 C. M. & R. 34.
[9] Underwood *v.* Waldron, 33 Mich. 232 [1878].
[10] Chandler *v.* Lazarus (Ark.), 18 S. W. Rep. 181.

requirements of good neighborhood in such a town would impose, i.e., each must use all due care and prudence to protect his neighbor, but is not bound at all events and under all circumstances to protect his neighbor, and any injury that may result notwithstanding the observance of proper caution must be deemed incident to the ownership of town property, and can give no right of action. Injuries from extraordinary or accidental circumstances for which no one is in fault must be left to be borne by those on whom they fall.[1]

184. Drainage of Surface-waters into Watercourses.—A property owner may drain waters from his land into streams or natural watercourses, and such a right to drain is not limited to the discharge of surface-waters in the same manner as when the land was in its natural state. The flow of surface-water may be changed and controlled by ditches and in other ways which accelerate the flow or increase the volume of water which reaches the stream. If in doing this he makes only a reasonable use of his premises, he exercises his legal right and incurs no liability to the lower owner.[2] A mine-owner may pump water from his land into a stream although the quantity of water in the stream be increased.[3] The natural capacity of the watercourse must not be overburdened to the injury of lower riparian owners.[4]

A lot flooded with surface-water from another building lot, flowing into an alley or street at the established grade, does not give the lot-owner a cause of action.[5] Surface-water from a garden, carrying solid matter into a mill-pond, does not give the mill-owner a cause of action.

Surface-water collected in the catch-basins or gutters beneath the surface of the road, and which percolates through the soil into a cellar upon a lot adjoining, gives no cause of action against the town.[7]

The right to have water drained from its property through the natural channel exists in favor of a municipal corporation to the same extent as in favor of a private individual.[8]

The owner of land bounded upon a watercourse has the right to all advantages of drainage which the stream reasonably used affords, and he may drain his land into the stream.[9]

Pits made by excavating for clay or building-stones and which form a natural reservoir into which surface-water collects may be emptied into a stream, even though the quantity be greater than it would otherwise have been, if the natural capacity of the watercourse be not exceeded. When such

[1] Underwood *v.* Waldron, 33 Mich. 232 [1876].

[2] Waffle *v.* N. Y. Cent. R. Co., 53 N. Y. 11; McCormick *v.* Horan, 81 N. Y. 86.

[3] Penn. Coal Co. *v.* Sanderson, 113 Pa. St. 126.

[4] Noonan *v.* Albany, 79 N. Y. 470; McCormick *v.* Horan, 81 N. Y. 86; Rudel *v.* Los Angeles Co. (Cal.), 50 Pac. Rep. 400.

[5] Phillips *v.* Waterhouse, 69 Ia. 199.

[6] Middlesex Co. *v.* McCue, 149 Mass. 103.

[7] Kennison *v.* Beverly, 146 Mass. 467. *But see* Toledo *v.* Grasser, 12 Ohio C. C. 520, where water escaped from a sewer.

[8] Keithsburg *v.* Simpson, 70 Ill. App. 467 [1896].

[9] 24 Amer. & Eng. Ency. Law 924, 925; Waffle *v.* N. Y. Central R. Co., 53 N. Y. 11 [1873].

waters are pumped from the ditch into a watercourse, such watercourse may not be obstructed by lower riparian owners to the injury of the owner of the pit or quarry,[1] and although the quantity of water in the stream is thereby increased in time of high water and diminished at other times to the damage of a riparian proprietor below.[2]

The owners of swamps, the waters of which naturally flow into natural watercourses, can make such canals in the swamps as are necessary to drain them of the water naturally flowing therein, though in so doing the flow of water in the natural watercourse is increased, whereby the water is discharged on the land of a person abutting on such watercourse.[3]

185. Prescriptive Rights to Drainage of Surface-water.—It is a general principle of the law of prescription that there can be no prescriptive right where there is no adverse user, and that there can be no adverse user without such use gives a right of action.* In those states which follow the common-law rule as to obstruction and repulsion of surface-waters † it is held that no lapse of time gives a right to drain surface-water in its natural state upon his neighbor's land. This result necessarily follows from the fact that the discharge of the water in its natural condition, or its obstruction or repulsion, gives no cause of action.[4] In those states where the civil law prevails,† the owner of the lower land may, by obstructing the flow of surface-waters for the necessary period without interruption, acquire a right by prescription to dam back such surface-waters that overflow such higher lands.

It is an actionable wrong, anywhere, for an owner of upper lands to collect surface-water in a ditch, drain, or other artificial stream, and cast it in a volume on the lower lands; therefore a right to so collect and discharge surface-waters may be acquired by prescription. In order to establish a prescriptive right to discharge waters upon lower lands, the owner of higher ground must have used the same ditch or channel for the full prescriptive period.[5] He cannot change the method of discharge and claim a right to discharge waters in the altered manner or in a different quantity.

Adverse user does not exist where the discharge of water is under license or by consent or permission of the owner of the low lands; and under such license no prescriptive right is acquired.‡ One who has a license from a town to fish and sail on a reservoir during his natural life cannot, by the use of such license, obtain an absolute title by prescription.[6] A request by a mill-dam owner for permission from riparian landowners to use a flash-board on

[1] McCormick *v.* Horan, 81 N. Y. 86.
[2] Waffle *v.* New York Central R. Co., 53 N. Y. 11 [1873]. *But see* Rudel *v.* Los Angles Co., 50 Pac. Rep. 400.
[3] Mizell *v.* McGowan (N. C.), 26 S. E. Rep. 783.
[4] 24 Amer. & Eng. Ency. Law 937.
[5] Leidlein *v.* Meyer (Mich.), 55 N. W. Rep. 367.
[6] Dunham *v.* New Britain (Conn.), 11 Atl. Rep. 354 [1888].

* *See* Secs. 326, *supra*, and 511–540, and 682–690, *infra*
† *See* Secs. 175–178, *supra*.
‡ *See* Secs. 682–690, *infra*, Prescription.

his dam, thus raising the water, is a sufficient acknowledgment of a superior right to defeat the subsequent acquisition of a prescriptive right to use a flash-board.[1]

Where surface-water collected in a natural depression, partly on defendant's land, but mostly on plaintiff's, has been used by the latter for many years to float logs, his adverse user, for ten years (in Mississippi), of a dam to raise the water gives him a right, as against defendant, to maintain the water at its artificial stage.[2] The measure of prescriptive right has been held not to be the dimensions of the drain, but the quantity of water discharged.[3]

186. Control and Regulation of Surface-waters by Municipal Corporations.—In the absence of any constitutional provision or statutory enactment to the contrary, the city incurs no liability to abutting owners on streets for injuries resulting to their property from the improvement, the grading or regrading of the city streets, if the work has been done in pursuance of authority conferred upon the city, and if the work has been executed in a prudent, careful, and skillful manner, so as to cause no unnecessary damage. The construction of drains, sewers, and gutters falls within this rule.

Such work is within the discretion of the city. For the mere failure or refusal to exercise it the city incurs no responsibility.[4] A city is not liable to the owner of private premises within its boundaries for failing to provide a system of sewerage to carry away from such premises surface-water naturally coming thereon.[5]

There is no obligation upon a city to continue in use a sewer or drain which it *has* built. It may wholly discontinue or abandon it without incurring liability to abutting owners, if the discontinuance or abandonment does not leave them in any worse condition than they would be if the drain or sewer had never been built.[6] If a city has provided a means of draining abutting property by gutters and sewers in the street, and makes subsequent changes in the grading of said street which destroy the drainage, there is no obligation on the city to provide new means for the same purpose.[7]

No liability arises for injury occasioned to land from being flooded with surface-water of the street which the city has neglected to drain. House-lots flooded with surface-water in consequence of a change of grade or alteration of the contour of the ground by constructing or grading the street are subject to such burdens, the injury from which no damages may be recovered against the city. The city may even prevent such surface-water from flowing into the street from a house-lot without incurring liability.[8]

[1] Weed *v.* Keenan (Vt.), 13 Atl. Rep. 804 [1888].

[2] Alcorn *v.* Sadler (Miss.), 14 So. Rep. 444; Leidlein *v.* Myer (Mich.), 55 N. W. Rep. 367.

[3] Chappel *v.* Smith, 80 Mich. 100.

[4] 24 Amer. & Eng. Ency. Law 942.

[5] St. Paul & D. R. Co. *v.* City of Duluth (Minn.), 58 N. W. Rep. 159.

[6] Atchison *v.* Challis, 9 Kan. 603. *See* Collins *v.* Waltham, 151 Mass. 198.

[7] Henderson *v.* Minneapolis, 32 Minn. 319; Waters *v.* Bay View, 61 Wis. 642 [1884], *and cases cited.*

[8] Keith *v.* Brocton, 136 Mass. 119; Kehrer *v.* Richmond (Va.), 22 The Reptr.

Where a municipal corporation, by grading and paving streets, prevents the absorption of rain, which is consequently discharged on adjoining land in greater quantities than it would otherwise have been, the municipality is not liable for the damages caused thereby, as it cannot be compelled to construct drains to dispose of surface-water.[1]

187. Surface-water Discharged or Detained by Grading Streets.—A city incurs no liability by filling up and grading its streets, even though it prevent surface-waters from adjoining lots flowing upon the street, or cause surface-waters to flow from such streets upon such lots, and to flow upon them in a different way and in larger quantities than before. When a city has exercised its discretion as to where it will build a sewer, and what water it will conduct into an existing sewer, and what drains it will connect therewith, its decision is not subject to review or question in the New York courts.[2] Nor is a city bound to furnish drains or sewers to relieve a lot of its surface-water.[3]*

A city lot-owner has a right to bring his lot to grade and thereby prevent surface-water, which has been turned there by the city in improving its streets, from flowing over it.[4]

188. Liability of City for Defective Plans for Drainage.—The adoption of a plan for the grading of a street has been held to involve the exercise of discretionary and judicial powers on the part of municipal officers, and that no liability exists for damages sustained by reason of a defect in the plan.[5]

Authority conferred upon cities to determine where drains and sewers should be built has been held in the nature of judicial powers, and to depend upon considerations affecting the public health and general convenience. For a mere error of judgment in the plan or system adopted the city is frequently held not liable. It has even been declared that "if a municipality adopt a plan however inefficient, and constructs its drains and sewers in conformity thereto, and injury results in consequence of the plan being defective or of the drains or sewers being deficient in size and inadequate to accommodate all the waters which, if the drains were larger, would naturally flow through them, there is no resulting liability."[6]

It is submitted that this is not a precise statement of the law. Many cases have held that it was negligence of the officers of a municipal corporation to assume such professional and expert duties as they are not qualified to

219 [1886]; Phillips *v.* Waterhouse (Ia.), 22 The Reptr. 330 [1886]; Churchill *v.* Beeth (Neb.), 66 N. W. Rep. 992; Borough of West Bellevue *v.* Huddlen (Pa.), 16 Atl. Rep. 764 [1889].

[1] Anchor Brew. Co. *v.* Dobbs Ferry (Sup.), 32 N. Y. Supp. 371.

[2] Lynch *v.* The Mayor, 76 N. Y. 60; Jordan *v.* Benwood (W. Va.), 26 S. E. Rep. 266.

[3] Jordan *v.* Benwood (W. Va.), 26 S. E. Rep. 266. *But see* Edwards *v.* Peoria, 66 Ill. App. 68.

[4] Cedar Falls *v.* Hansen (Ia.), 73 N. W. Rep. 585 [1897]. *But see* Davidson *v.* Sanders, 1 Pa. Super. Ct. Rep. 432, where a landowner negligently changed the grade of his lot.

[5] 24 Amer. & Eng. Ency. Law 945; Sullivan, Town of *v.* Phillips (Ind.), 11 N. E. Rep. 300 [1887].

[6] 24 Amer. & Eng. Ency. Law 945.

* *See* Sec. 186, *supra.*

undertake; that for public officers to undertake to pass upon the efficiency and suitableness of a sewer or system of sewers for a city or community was such negligence as would render the city liable for their want of due and ordinary care. As well might city officials undertake the treatment of diseases in the wards of a public hospital, or to defend actions brought against the city in a court, as to undertake to plan a system of drains or sewers or any other important public improvement that the needs of the city require. There can be no doubt but that a city would be liable to a patient confined in a pest-house for treatment furnished him which was not of a professional and reasonably skillful character. A municipal corporation in one case is the guardian of the public health and must guarantee to its citizens over whom or whose property it assumes control that they or their property shall not be neglected, but shall have proper and skillful services of professional men. If property is subject to injuries from sewers or other structures, it is a want of ordinary care for the agents of such cities to undertake professional duties for which they have no special preparation or skill.[1] Many cases hold that a city must exercise due care and skill in the selection of a plan, and must furnish drains and sewers of sufficient capacity to carry off all the water which may reasonably be expected to accumulate.[2]

Some of the cases cited are doubtless decided on the ground that the necessity for the sewers or drains was occasioned by the act of the city in collecting the water, and that therefore it were bound to furnish adequate means of drainage; others perhaps on the ground that it was negligence for officers of a city without special qualifications to select a design for sewers. A plan adopted by a city for a structure must be a reasonable one; and if it is not, inquiry may be made as to how it was adopted; and if negligence can be shown, or want of ordinary and reasonable care, in its adoption, then the city may be held for negligence.

189. Liability for Defective Construction or Inferior Materials.—After a plan has been adopted, the manner of its execution is, with respect to the rights of citizens, a ministerial duty, and for any negligence or unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private property, the city will be held responsible.[3] If the city cut a gutter and thereby caused the surface-water, which had theretofore flowed by natural outlet, to flow along the gutter, and the said gutter was so negligently constructed as to cause the water to percolate into plaintiff's basement, and to cause the floor to crack, etc., to plaintiff's damage, the city is liable.[4]

[1] Wait's Engin. and Arch. Jurisp., Sec. 245–247.

[2] Spangler *v.* San Francisco, 84 Cal. 17; Aurora *v.* Lode, 93 Ill. 521; Dickson *v.* Baker, 65 Ill. 518; Indianapolis *v.* Huffer, 30 Ind. 235; Weis *v.* Maddeson, 75 Ind. 241; Evansville *v.* Decker, 84 Ind. 325; Ellis *v.* Iowa City, 29 Ia. 229.

[3] Hitchins *v.* Frostburg, 68 Md. 100. *And see* North Vernon *v.* Voegler, 103 Ind. 316.

[4] Comanche *v.* Zettlemoyer (Tex.), 40 S. W. Rep. 641.

190. Accumulation and Discharge of Waters upon Private Lands.—If a city change the natural flow of water and divert it into another direction, and cause it to flow in large quantities upon abutting premises, the corporation is liable in damages without regard to the efficiency of the plan and whether the work was negligent or not.[1]

The accumulation of a large volume of water in one channel by the city or a person, imposes a duty to see that suitable provision is made for the escape of waters into a natural watercourse or such other channel as will carry it off without injury. If such accumulated waters therefore are cast upon private property to its injury on account of the insufficiency of a drain or sewer the city must respond in damages.[2] Where surface-water is collected in gutters and conducted to the mouth of a sewer which is insufficient, and which, by reason thereof, flows upon private property, the city will be liable. The construction of public works is a ministerial act and must be performed in a skillful, prudent, and careful manner, so as not to injure private property. A city is liable for the unskillful manner of performing work upon public improvements. It is held liable for negligence in grading a street so as to turn water upon abutting owner's land.[3]* However, it is submitted that in these cases there must have been elements of negligence and a failure to exercise ordinary care.[4]

191. Obstruction, Diversion, and Repulsion of Surface-waters by Railroads.—One of the most common obstructions of surface-waters is that of railroad embankments. When a railroad passes across or through a valley and over the lowlands, it is essential that the track be elevated upon embankments or trestles, so as to escape high waters due to freshets. These long, continuous embankments obstruct the passage of surface- and flood-waters and greatly increase the flow through natural channels of the stream.

In the application of the law to such obstruction and detention of waters, and in the absence of express statutory enactment, railroads are liable to the same extent and in the same manner as individual landowners in the management and improvement of their land.† In the absence of a special legislative enactment, they are liable under the same rules and laws for the detention, obstruction, and diversion of surface-waters.[5]

In those states which have adopted the rule of the common law‡ any

[1] 24 Amer. & Eng. Ency. Law 946, *many cases cited. But see* Myers *v.* Nelson (Cal.), 44 Pac. Rep. 801, *and see* Rutherford *v.* Holly (N. Y.), 11 N. E. Rep. 818 [1887].

[2] Sullivan *v.* Phillips (Ind.), 11 N. E. Rep. 300 [1887]; Baltimore Brew. Co. *v.* Ranstead (Md.), 28 Atl. Rep. 273; Jordan *v.* Benwood (W. Va.), 26 S. E. Rep. 266; Carll *v.* Northport (Sup.), 42 N. Y. Supp. 576.

[3] Cotes *v.* Davenport, 9 Ia. 227; Ellis *v.* Iowa City, 29 Ia. 229.

[4] Wallace *v.* Musketine (Ia.), 4 Green. 373.

[5] Egener *v.* New York, etc., Ry. Co. (Sup.), 38 N. Y. Sup. 319; Yazoo, etc., R. Co. *v.* Davis (Miss.), 19 So. Rep. 487.

* *See* Secs. 186–188, *supra.* † *See* Secs. 112–121, *supra.*
‡ *See* Secs. 175–178, *infra.*

injury which results, to the property taken, from the obstruction and holding back of surface-waters by the construction of embankments is usually considered by the jury or commissioners in assessing or awarding damages for the property taken; but when no part of the property of the plaintiff has been taken, but the railroad has been constructed upon adjoining property, then he will not have been awarded damages, and he has been held entitled to compensation for his injuries.

A landowner whose property is flooded by the obstruction of the flow of surface-waters has no cause of action for injuries suffered in those states which have adopted the common-law rule. The grant of a right of way for a railroad has been held to include a right to make all necessary embankments, ditches, etc.; and if the flow of surface-water from the remaining lands of the grantor be obstructed by such embankments and structures, the grantor cannot recover damages from the company. A property owner should anticipate such obstruction and stipulate, in his grant of a right of way, for openings, culverts, and trestles which shall provide a discharge for the drainage of his land.[1]

In those states which follow the rule of the civil law * there is no presumption that when a railroad acquired its right of way compensation was made for such injuries as would result from the damming back of the surface-water by the embankment or other structures. Railroad rights of way have been held subject to the same easement or servitude of drainage for such surface-waters as naturally flow from the higher ground as are the lands of adjoining owners. Any obstruction or improper interference with such flow of drainage to the damage of higher landowners is an actionable wrong.

The company must provide adequate drainage of the adjoining lands, by the construction of culverts, ditches, or other means, and such culverts and other openings must be of ample capacity to discharge the ordinary and usual flow of surface-waters. They need not be designed and constructed so as to provide for extraordinary floods and excessive rainfalls which cannot be foreseen by reasonable investigation.[2] They are sometimes required to provide drainage by express statute.[3]

A cause of action for damage to land overflowed by reason of the construction of a railroad bed without provision for draining off surface-water accrues at the date of the overflow and not when the railroad is built.[4]

A railroad company which permits the surface-water flowing on other land to accumulate on its right of way is liable for damage done to other

[1] McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433 [1874].
[2] 24 Amer. & Eng. Ency. Law 950–953.
[3] Dobbins *v.* Missouri, etc., R. Co. (Tex.), 41 S. W. Rep. 62; Bonner *v.* Wirth (Tex.), 24 S. W. Rep. 306; Galveston, etc., Ry. Co. *v.* Parr (Tex.), 28 S. W. Rep. 264.
[4] Bonner *v.* Wirth (Tex.), 24 S. W. Rep. 306.

* *See* Secs. 175–178, *supra.*

persons by allowing it to be discharged on their land in accumulated quantities.[1]

192. Liability for Negligent Construction.—In general a railroad company must exercise reasonable care in the design and erection of its structures, for it will be liable if the construction is negligent.[2] If without extra expense a culvert or a trestle could have been erected in place of an embankment which has caused the damage, the railroad company will be liable.[3]

Where a railway company, for the purpose of properly constructing its roadbed, takes earth from one part of its premises and uses it upon the roadbed, thus leaving a ditch along each side of it, in the usual way of constructing railways in level countries, the company will not be liable to an adjoining landowner through whose premises a right of way has been properly condemned and paid for, on account of injuries caused by surface-water, even though the effect of such ditches and roadbed may be to prevent surface-water, which before flowed upon the land, from coming upon it, or to draw from adjoining land surface-water which would otherwise remain there, or to shed surface-water over land on which it would not otherwise go.[4]

193. Measure of Damages Due to Surface-waters.—When lands are flooded and are totally destroyed by the wrongful act of another, the owner is entitled to recover actual and cash value of his land at the time of its destruction, with legal interest thereon to the time of trial.[5] If the land has suffered permanent injury, but is not totally destroyed, the owner may recover the difference between the actual cash value immediately preceding the injury and its value thereafter, with legal interest. If the injury be temporary only, the owner will be entitled to recover the amount necessary to repair the injury and put the land in the condition in which it was immediately preceding the injury, with interest.

The courts have not invariably followed this rule, but it is without doubt the general measure of damages. Thus when gravel had been washed down on plaintiff's land, it was held that the measure of damages was the depreciation in value of the premises and not the cost of removing the gravel.[6] When the injury is temporary, but deprives the owner of the use of his property or his house, he may recover the value of such use in addition to the cost of repairs. The measure of damages may be the diminished rental of the premises during the continuance of the wrongful act. The probable benefits

[1] Borchsenius *v.* Chicago, St. P. M. & O. R. Co. (Wis.), 71 N. W. Rep. 884, *citing* Bowlsby *v.* Speer, 31 N. J. Law 351.

[2] St. Louis, etc., Ry. Co. *v.* Craigo (Tex.), 31 S. W. Rep. 207; Galveston, etc., Ry. Co. *v.* Parr (Tex.), 28 S. W. Rep. 264; Texas, etc., Ry. Co. *v.* Padgett (Tex.), 37 S. W. Rep. 92; McCormick *v.* Kans. C., etc., R. Co., 57 Mo. 433 [1874].

[3] Canton, etc., R. Co. *v.* Paine (Miss.), 19 So. Rep. 199; Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237; Sinai *v.* Railway Co., 71 Miss. 547; Henry *v.* Ohio River R. Co. (W. Va.), 21 S. E. Rep. 863.

[4] Missouri Pac. Ry. Co. *v.* Renfro (Kan.), 34 Pac. Rep. 802.

[5] Trinity, etc., R. Co. *v.* Schofield, 72 Tex. 499.

[6] Easterbrook *v.* Erie R. Co. (N. Y.), 51 Barb. 94. *And see* 24 Amer. & Eng. Ency. Law 954–956.

to be derived from the cultivation of the soil are regarded as too speculative and uncertain to afford a criterion of damage, and no recovery can be had therefor. If the owner recover for the injuries sustained to his realty, crops, household goods, and supplies, he may not also recover for the decrease in the rental value of the premises, as such a recovery would be in effect a double recovery for the same damage.[1]

When plaintiff's wall, supporting the street several feet above his lot, and his house foundation had been shoved out of place and the house destroyed, by defendant's wrongful obstruction of surface-water, it was held no error to charge that the damages cannot be exactly calculated; that they are necessarily indefinite, and that plaintiff need only show the facts from which the jury can fairly estimate the injury done; that the cost is some evidence of value, but not conclusive; and that the measure of damages was what the improvements were worth on that particular lot, less the value of the materials remaining.[2]

The owner of the injured premises is entitled to compensation for any diminution in the market value of the land; but if the market value be increased, and the building be damaged, the amount of increase cannot be set off against the damage to the building.[3]

A landlord may not recover damages and inconvenience suffered by his tenants, but only for the recovery to the buildings and premises and for his own actual loss suffered. The landlord has no such interest in the growing crops of his tenants as will enable him to maintain an action for the injury to them. If crops are destroyed, the measure of damages is the value of such crops with interest from the time of destruction. As to whether the injury amounts to the total or only the partial destruction of value, whether it be permanent or temporary, as well as the extent of the injury and the damages consequent to it, are all questions for the jury under proper instructions. If the overflow of the premises create sickness and render them unwholesome, this is an element of damage, and evidence of these facts may be properly admitted. If malice or wantonness on the part of the defendant be shown, the party injured may recover exemplary as well as compensatory damages.

194. Measure of Damage from Diversion of Surface-waters.—If permanent injury to the premises result from diversion, the proper measure of damages is the difference between the market value of the property before the injury and that after it.[4] In some cases consideration is given to the effect upon its present use and upon its permanent value.[5]

Usually the damages assessed are the difference in the market value immediately before and immediately after the diversion of the stream, if the

[1] 24 Amer. & Eng. Ency. Law 955.
[2] Lucot *v.* Rodgers (Pa. Sup.), 28 Atl. Rep. 242.
[3] Farkas *v.* Towns (Ga.), 29 S. E. Rep. 700 [1897].
[4] Shenango, etc., R. Co. *v.* Braham, 79 Pa. St. 447.
[5] Finley *v.* Hershey, 41 Ia. 389.

injuries are permanent,[1] and not the amount paid for repairs.[2] In an action against a town for turning water from a highway upon abutting land, the measure of damages was held to be the actual damage done, and evidence as to the difference between the market value of the land before and after the injury was held inadmissible.[3]

The measure of permanent damages caused by an overflow due to a structure has been held to be "the difference in the value of the land in its condition when the right of action accrued and what its value would have been if the structure had been skillfully erected," and not "the difference in value of the land before the road was built and the value after it was built."[4]

Another case makes the measure of damages such a sum as will put the land in as good condition as it was before the flooding, together with compensation for any loss of use during the time it was rendered unfit for occupation.[5] Proof as to the cost of restoring the land, and of the diminution in its market value, is alike admissible in an action for damages, as either measure is likely to obtain according as the one or the other is found to be the less.[6] The damages are limited to those sustained prior to the date of the writ.[7]

Where plaintiff's land was overflowed and damaged by reason of a diversion of surface-water from its natural outlet, he was entitled to permanent damages.[8]

195. What Damages may be Assessed.—The damages assessed must be reasonable and proportionate to the amount suffered. A verdict of $500 for the flowage of land will be set aside on appeal where the land flowed was not more than one thirtieth of an acre, and the rental value was $2.50 per acre, and the land had been overflowed but three years.[9]

Evidence of additional expense of shipping bricks to market by reason of the obstruction of plaintiff's water front by a railroad structure (track) was held admissible in proving damages.[10] The plaintiff is entitled to such damages as he has sustained.[11]

When land has been overflowed and softened and made muddy, it has been held that the value of stock killed and injured from being mired, and the reasonable expense of guarding and treating the animals, were proper items of damage.[12]

[1] Cummings *v.* Toledo, 12 Ohio C. C. 650; Hanover W. Co. *v.* Ashland I. Co., 84 Pa. St. 279; San Antonio, etc., R. Co. *v.* Mohl (Tex.), 37 S. W. Rep. 22. *But see* Bare *v.* Hoffman, 79 Pa. St. 71.

[2] Toledo *v.* Grasser, 12 Ohio C. C. 520.

[3] Eshleman *v.* Township of Martic (Pa. Sup.), 25 Atl. Rep. 178.

[4] Parker *v.* Norfolk & C. R. Co. (N. C.), 25 S. E. Rep. 722. *But see* Missouri, etc., Ry. Co. *v.* Graham (Tex.), 33 S. W. Rep. 576, *and* San Antonio, etc., R. Co. *v.* Mohl (Tex.), 37 S. W. Rep. 22.

[5] City of Keithsburg *v.* Simpson, 70 Ill. App. 467.

[6] Hartshorn *v.* Chaddock (N. Y. App.), 31 N. E. Rep. 997.

[7] Williams *v.* Camden & R. W. Co. (Me.), 11 Atl. Rep. 600 [1888].

[8] Parker *v.* Norfolk & C. R. Co. (N. C.), 25 S. E. Rep. 722.

[9] Tucker *v.* Chicago & A. R. Co., 2 Mo. App. Rep. 1328.

[10] Rumsey *v.* New York, etc., R. Co. (N. Y. App.), 30 N. E. Rep. 654.

[11] Rumsey *v.* N.Y., etc., R. Co., *supra.*

[12] Hughes *v.* Austin (Tex.), 33 S. W. Rep. 607.

CHAPTER XII.

FOULING AND POLLUTION OF SURFACE-WATERS AND STREAMS.

201. Pollution of Streams and Bodies of Water.—An owner of land on a natural stream has a property right in the water, and a right to have it flow in its natural state over and along his land in its usual volume and purity. This right extends to the quality of water as well as to the quantity.[1] If the waters of a stream or pond are fouled by the operation of works, mills, or manufactories, the parties operating them are liable in damages to the parties owning the water rights for the damages suffered, or the operation of the works may be prevented and the pollution stopped by an injunction.

202. What Constitutes a Fouling of Waters.—"It is not every impurity imparted to the water, however small in degree, that will be the subject of an injunction [or of damages]. All running streams are, to a certain extent, polluted; and especially so are they when they flow through populous regions of the country, and the waters are utilized for mechanical and manufacturing purposes. The washings of the manured and cultivated fields, and the natural drainage of the country, of necessity bring many impurities to the stream, but these and like sources of pollution cannot, ordinarily, be restrained by the court.[2] Therefore when we speak of the right of each riparian proprietor to have the water of a natural stream flow through the land in its natural purity, those descriptive terms must be understood in a comparative sense; as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. Any use that materially fouls or adulterates the water, or the deposit or discharge therein of any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the

[1] 10 Amer. & Eng. Ency. Law 844; 25 *id.* 968; Grey *v.* Paterson (N. J. Ch.), 42 Atl. Rep. 749 [1899]; Greene *v.* Nunnemacher, 36 Wis. 50; Owens *v.* Lancaster (Pa.), 37 Atl. Rep. 858.

[2] Wood *v.* Sutliffe, 2 Sim. N. S. 163.

ordinary purposes of life, will constitute a nuisance, for the restraint of which a court of equity will interpose."[1]

"It is not every slight pollution of the waters of a stream, nor every disagreeable odor, that is to be dealt with as a nuisance to be put down by the authority of the law. The abatement of a nuisance does not necessarily mean the entire and absolute removal of all pollution of a stream and all disagreeable odor, but such diminution of pollution or smell as to render it such as ought fairly and reasonably to be submitted to."[2] However, any pollution of a natural stream which renders the water unfit for the usual and proper purposes for which it may be used is a nuisance, and will be prevented by the courts, and the party who pollutes or contaminates water may be liable to others who are injured by his acts.[3]

203. Sources of Pollution.—Instances of pollution of waters are very common in engineering operations, such as (1) by the discharge of sewers; (2) by the operation of mills, factories, and works; and (3) by the flow of impure waters from mines and tunnels. These will be taken up in the order named.

204. Pollution by the Discharge of Sewers.—An unreasonable discharge of sewage into a stream or pond to the injury and inconvenience of riparian owners will render the parties authorizing or committing the act liable in damages therefor.[4] The owner of a private waterway, as a stream or a mill-race[5] or a fish-pond,[6] may recover damages for injuries to his water rights, as by the discharge of sewage or the drainage of filthy street-water into them.[7]

205. Natural Streams Must Receive Natural Drainage.—A riparian owner has a right to drain surface-waters from his land into a natural stream in a reasonable manner. He is not limited to the discharge which existed when the land was in its primitive state, if he does not surcharge the stream beyond its natural capacity. One may change and control the natural flow of surface-water on his lands, as by ditches and reservoirs, and increase the flow of water which reaches a stream if he does so in the reasonable use of

[1] Alvey, Justice, in Baltimore *v.* Warren Mfg. Co., 59 Md. 96; Norton *v.* Scholefield, 9 M. & W. 665.

[2] Lord Armitage, in Robinson *v.* Stewart, 11 Macph. (Sc.) 189.

[3] Chipman *v.* Palmer, 77 N. Y. 51, *sewer;* Sanderson *v.* Penn. Coal Co., 86 Pa. St. 401; Woodyear *v.* Schaefer, 57 Md. 1; Randolph *v.* Dobson (Com. Pl.), 11 Montg.Co. Law Reptr. 197.

[4] Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; Kellogg *v.* New Britain, 62 Conn. 232; Nolan *v.* New Britain (Conn.), 38 Atl. Rep. 703 [1897]; Smith *v.* Cranford (Sup.), 32 N. Y. Supp. 375; Good *v.* Altoona (Pa. Sup.), 29 Atl. Rep. 741; Woodyear *v.* Schafer, 57 Md. 1; Petersen *v.* Santa Rosa (Cal.), 51 Pac. Rep. 557 [1897]; City of Paris *v.* Allred (Tex.), 43 S. W. Rep. 62 [1897]; Watson *v.* Toronto, etc., Water Co., 4 U. C. Q. B. 158. *See also* State *v.* Frieberg (Ohio), 31 N. E. Rep. 881.

[5] Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435.

[6] Smith *v.* Cranford (Sup.), 32 N. Y. Supp. 375; Seaman *v.* Lee, 10 Hun (N. Y.) 607; Fitzgerald *v.* Firbank (C. A.), L. R. 2 Ch. 96 [1897].

[7] Columbus *v.* Hydraulic Woolen Mills Co., *supra.*

his lands. He may pump unusual quantities of water into a stream, as from a quarry in which it has collected.[1] *

In some cases this principle of the law seems to have been extended to the discharge of sewers into streams. It has been held that a properly constructed city sewer may be discharged into a stream which is the natural drainage of the land on which the city is built, and the pollution of the stream gives no right of action to a lower riparian owner whose mill property, constructed and operated before the building of the city, is injured thereby.[2]

In California it has been held that a *non*-riparian appropriator of the water of a stream has no right of action for the pollution of the water of said stream by a prior riparian owner who, in the interest of sanitary conditions, discharges sewage into said stream.[3]

In Texas a city can maintain an action to abate a nuisance caused by the emptying of a private sewer into a creek running through the city, though it has no interest in the land or the creek in question.[4]

A canal company may maintain an action of tort against a city for constructing sewers and drains over the company's lands and discharging them into the canal, even though the city be authorized by its charter to build its drains and sewers through private lands, and the canal was constructed in the channel of an ancient, natural watercourse.[5] Some cases hold that it must be proved to be a nuisance.[6]

The use of a stream for the discharge of sewers is sometimes authorized by the state legislatures or by city councils.[7] Such an act, however, does not license a city to create a nuisance by discharging such quantities of sewage as to pollute the river.[8]

In an action by a city to abate a nuisance caused by the emptying of a private sewer into a creek, it is no defense that the city authorities authorized defendant to construct the sewer and empty it into such creek.[9]

206. Degree of Pollution that will be Enjoined.—When the pollution of the stream was scarcely perceptible and the injury trifling, the court may refuse an injunction to restrain the discharge of sewage into a river and

[1] McCormick *v.* Horan, 81 N. Y. 86; Waffle *v.* N. Y. Cent. R. Co., 53 N. Y. 11. *And see* Drains and Sewers, 6 Amer. & Eng. Ency. Law 2.

[2] City of Richmond *v.* Test (Ind.), 48 N. E. Rep. 610 [1897]. *But see* People *v.* McCune (Utah), 46 Pac. Rep. 658, *and* Jeanette Borough *v.* Eschallier, 28 Pittsb. Leg. J. (N. S.) 383 [1898], *and* Murphy *v.* Wilmington, 5 Del. Ch. 281

[3] Conrad *v.* Arrowhead Hotel Co. (Cal.), 37 Pac. Rep. 386. *See* Cone *v.* Hartford, 28 Conn. 363.

[4] City of Belton *v.* Baylor Female College (Tex.), 33 S. W. Rep. 680; City of Llano *v.* County of Llano, 5 Tex. Civ. App. 133, *following* City of Belton *v.* Central Hotel Co. (Tex.), 33 S. W. Rep. 297.

[5] Locks & Canals *v.* Lowell (Mass.), 7 Gray 223. *See* Nolan *v.* New Britain (Conn.), 38 Atl. Rep. 703 [1897].

[6] Robb *v.* Village of LaGrange (Ill. Sup.), 42 N. E. Rep. 77, 57 Ill. App. 386.

[7] Public Laws New Jersey, Act Feb. 26, 1868, p. 126.

[8] Grey *v.* Paterson (N. J. Ch.), 42 Atl. Rep. 749 [1899].

[9] City of Belton *v.* Baylor Female College (Tex.), 33 S. W. Rep. 680.

* *See* Sec. 184, *supra.*

dismiss the petition with costs.[1] When, however, an owner of land, on a stream the water of which is naturally pure, is found entitled to an injunction against a city to prevent the pollution of the water by discharge of its sewage, and before the findings are prepared the case is opened and the city alleges, by an amended answer, that it has about completed a plant by which the pollution of the waters will be prevented, and shows that the sewage is thereby rendered pure and inodorous, but does not show that it is rendered potable and fit for use, the water will be presumed to still remain unfit for use, and an injunction may be granted to prevent the turning of the sewage into the stream.[2] Likewise when, in an action against a mining company to enjoin discoloration of a stream, it appeared that the discoloration was caused by clay found in a fissure of a rock intersected by the shaft, and that after continuing several months it began to abate, so that defendant was able, by the use of a settling-basin, to deliver the water to the stream in a clear condition, and that such was the condition of affairs at the final hearing, six months after the bill was filed, and it also appeared that defendant denied complainant's case throughout, and claimed the right to throw the discolored water into the stream, and that there was some danger of discoloration in the future, it was held that the decree establishing complainant's rights should include a provision for a perpetual injunction against discoloration.[3]

207. Reasonable Use of Waters of a Stream.—The reasonableness in such cases depends upon the circumstances of each particular case. In regard to manufacturing purposes there must certainly be more or less refuse matter which, by ordinary care, could be prevented from falling into the stream, in which case the reasonableness of the use of the water must determine the right, and this must be governed by the extent of detriment received by the riparian proprietors below.[4] Another circumstance which may figure prominently in determining the reasonableness of the uses of a stream is the purpose for which the waters of the stream are employed. A stream which flows into a reservoir and supplies drinking-water for a village or city would not permit uses which might be tolerated in a stream used for manufacturing purposes.[5] On the other hand, a manufacturing plant which required soft water, as in the manufacture of woolens, might justly complain about the introduction of chemicals which made the water hard and thereby destroyed the quality of the water which it had enjoyed previously. Water from a limestone-quarry might not injure it for domestic or farming purposes, and yet totally destroy its utility for certain manufacturing purposes.

[1] Atty.-Gen'l *v.* Gee (Eng.), 10 Eq. 131, *See* Lingwood *v.* Stowmarket Co. (Eng.), 1 Eq. 77. 336.

[2] Peterson *v.* Santa Rosa (Cal.), 51 Pac. Rep. 557 [1897].

[3] Beach *v.* Sterling I. & Z. Co. (N. J. Ch.), 33 Atl. Rep. 286.

[4] Lockwood Co. *v.* Lawrence, 77 Me. 297; Townsend *v.* Bell (Sup.), 24 N. Y. Supp. 193; Owens *v.* Lancaster (Pa.), 37 Atl. Rep, 858; People *v* McCune (Utah), 46 Pac. Rep. 658.

[5] Commonwealth *v.* Russell (Pa. Sup.), 33 Atl. Rep. 709; Kelley *v.* New York (Sup.), 27 N. Y. Supp. 164.

The discharge, into a stream, of water made muddy by the ordinary operations of engineering work has been held a sufficient pollution of the waters of the stream for an injunction to issue to prevent it.[1]

The discharge of water used in the manufacture of lead has been held a nuisance to the lower manufacturer of paper.[2] The injury from the discharge of sewers into a river by a town has been held too trifling to warrant the issue of an injunction.[3] It must be presumed that this was a small sewer emptying into a large river, otherwise it cannot be considered in line with many cases decided. In a case where water, though pure and fit for primary use, had never been used for domestic purposes, the court refused an injunction to prevent the discharge of a sewer, no other injury or damage being alleged except that it killed the trout and occasioned an unwholesome smell, which, however, was not proved at the trial.[4] However, the pollution of a river by the discharge of city sewage gathered from a large area, and caused to flow into the stream by artificially constructed grades, cannot be justified as a natural and reasonable use of the river.[5] Whether the use of a stream which contaminates its waters is reasonable or not is a question of fact for the jury.[6]

Evidence of a usage to discharge waste products into streams is not admissible to show a right to do so to the injury of other riparian owners.[7]

208. Instances of Reasonable Use.—A reasonable use of waters for the discharge of refuse material will be illustrated best by a few instances. It has been held to be a reasonable use to run sawdust and refuse from a sawmill into a stream.[8] A sanitarium has been permitted to discharge waters into a stream which had been used for purposes of bathing patients.[9]

When a stream in its natural state is more useful to all the owners for stock purposes than for ordinary domestic uses, it has been held that an upper owner might reasonably use it and could maintain a hog-yard.[10] The reasonableness of such a use seems to depend somewhat upon the number of pigs or cattle kept. It has frequently been held that keeping of large cattle-stables or hog-pens in the vicinity of a running stream, of which it caused the pollution, was a nuisance and would be restrained.[11] The use of a stream

[1] Clowes *v.* Staffordshire Potteries (Eng.), L. R. 8 Ch. 126; Beach *v.* Sterling I. & Z. Co. (N. J. Ch.), 33 Atl. Rep. 286.

[2] Hodgkinson *v.* Ennon (Eng.), 4 B. & S. 229.

[3] Atty.-Gen'l *v.* Gee (Eng.), 10 Eq. 131.

[4] Lillywhite *v.* Trimmer, 16 L. T. N. S. 318.

[5] Grey *v.* Paterson (N. J. Ch.), 42 Atl. Rep. 749.

[6] Hayes *v.* Waldron, 44 N. H. 580; Gavigan *v.* Atl. Ref. Co. (Pa.), 40 Atl. Rep. 834 [1898].

[7] Hayes *v.* Waldron, 44 N. H. 580; Suffolk Gold Mining Co. *v.* San Miguel Mining Co. (Col. App.), 48 Pac. Rep. 828.

[8] Red River R. Mills *v.* Wright, 30 Minn. 249; Jacobs *v.* Allard, 42 Vt. 303.

[9] Barnard *v.* Shirley (Ind.), 34 N. E. Rep. 600 [1893].

[10] Hazeltine *v.* Case, 36 Wis. 391. *But see* People *v.* Elk R. M. & L. Co. (Cal.), 40 Pac. Rep. 486. *But see, contra*, Smith *v.* McConathy, 11 Mo. 518, *and* Baltimore *v.* Warren Mfg. Co. 59 Md. 96.

[11] Green *v.* Nunnemacher, 36 Wis. 50; Davis *v.* Lambertson (N. Y.), 56 Barb. 480; People *v.* Elk River M. & L. Co. (Cal.), 40 Pac. Rep. 486.

for general farming purposes and for stock, and a fouling of the water by a stable in which were kept and fed 3750 head of cattle, were prohibited by injunction at the instance of a lower riparian owner.[1] In some states it is a misdemeanor to keep stock housed over, or on the borders of, any stream used for a water-supply.[2]

The discharge, into a stream, of whey from a cheese-factory,[3] or the refuse from a starch-factory,[4] has been held a proper cause for complaint. Though a stream is contaminated somewhat by natural and unavoidable drainage of surface-water into it, yet it does not justify the discharge of an underdrain through a cemetery.[5] A ferryman who has run a ferry across a stream for forty years may recover damages for injuries due to discharging a sewer just above his slip and which filled it with sand and dirt, preventing him from entering it with his boat.[6]

209. An Injunction or Damages may be Had for Pollution.—If the pollution of a stream be a continuing one, or amount to a nuisance,[7] the party injured may proceed either at law or in equity,[8] especially when such use will cause irreparable injury or endanger a landowner's rights by adverse possession if allowed to continue.[9]

Equity cannot restrain the maintenance of a slaughter-house on a stream flowing through a city merely because it is made a misdemeanor by Rev. St. § 1418, no injury to plaintiff's property or rights being shown.[10] He may have an injunction to prevent the pollution of a stream by the discharge of sewage of a city.[11] The injunction will not fail because it is not limited to a specified part of the stream.[12]

A water company which supplies water to a city and owns land on a non-navigable river, from which a portion of its supply is derived, is a riparian owner in the full sense of the word, and as such may perpetually enjoin a deposit, in the stream, of substances which pollute the water.[13]

[1] Barton *v.* Union C. Co. (Neb.), 7 L. R. A. 457 [1889]. *And see* Losey *v.* Buchanan, 51 N. Y. 477.

[2] People *v.* Borda (Cal.), 38 Pac. Rep. 1110.

[3] Snow *v.* Williams (N. Y.), 16 Hun 468.

[4] Middlestadt *v.* Waupaca S. & P. Co. (Wis.), 66 N. W. Rep. 713.

[5] Barrett *v.* Mt. Greenwood Cem. Assn. (Ill. Sup.), 42 N. E. Rep. 891, *reversing* 57 Ill. App. 401.

[6] Sleight *v.* Kingston (N. Y.), 11 Hun 594.

[7] Crane *v.* Windsor, 2 Utah 248.

[8] Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.), 189; Holsman *v.* Boiling Sp. Bl. Co., 14 N. J. Eq. 335; Atty.-Gen'l *v.* Steward, 20 N. J. Eq. 415; Barton *v.* Union Cattle Co. (Neb.), 7 L. R. A. 457 [1889]. *See* Chipman *v.* Palmer, 77 N. Y. 51.

[9] 28 Amer. & Eng. Ency. Law 970; 10 *id.* 844.

[10] Tiede *v.* Schneidt (Wis.), 74 N. W. Rep. 798 [1898].

[11] Peterson *v.* Santa Rosa (Cal.), 51 Pac. Rep. 557 [1897]; People *v.* San Luis Obispo (Cal.), 48 Pac. Rep. 723; Nolan *v.* New Britain (Conn.), 38 Atl. Rep. 703; State *v.* Frieberg (Ohio Sup.), 31 N. E. Rep. 881; Woodyear *v.* Schaefer, 57 Md. 1; Lind *v.* San Luis Obispo (Cal.), 42 Pac. Rep. 437. The value of affidavits in dissolving an injunction is discussed in Tiede *v.* Schneidt (Wis.), 74 N. W. Rep. 798 [1898].

[12] People *v.* San Luis Obispo (Cal.), 48 Pac. Rep. 723.

[13] Indianapolis W. Co. *v.* Amer. S. Co. (C. C.), 53 Fed. Rep. 970.

210. Purification of Sewage Required. — Injunction suits frequently necessitate the erection of sewage-disposal works for the purification of the discharge before it is emptied into streams, and they do not always meet the requirements of the law. A purification plant which renders the sewage clear and inodorous has been held not to answer a complaint by a landowner that his water was pure and fit for use. To avoid an injunction the sewage must be purified so that the waters are potable and fit for use.[1]

The discharge from the purification works, though sterilized, colorless, and odorless, must not contain substances which, by reason of their combination with other substances wrongfully deposited in the stream, make the waters noxious and polluted.[2]

211. Rights of Riparian Owners cannot be Taken Without Compensation.—In some states power is given to cities and villages to appropriate the water of a stream or pond, or to utilize streams for the discharge of sewers. Such acts would be illegal unless they provide, either expressly or impliedly, for compensation to riparian owners.[3] Under an act providing that public sewers shall be established along the principal course of drainage to such extent and under such regulations as may be provided by ordinance, a stream may be used for sewer purposes by having a sewer empty into it.[4]

In the absence of legal right acquired by legislative act, grant, or prescription, a municipal corporation which causes or permits its sewage to pollute a watercourse is guilty of nuisance, for which damages may be recovered by a landowner who is entitled to its use.[5] It is no excuse that the public health and convenience will be best subserved by discharging the sewage into the stream.[6]

Damages may be recovered from a city which constructs its sewers so that they empty into a stream and render unfit for use all the waters on a farm, by reason of part of the stream going underground through seams and fissures in the limestone bed of the stream.[7]

212. Right to Discharge Sewage Acquired by Prescription.—Riparian owners are entitled to every ordinary use of the water of their streams, including the right to apply it in a reasonable way to purposes of trade and manufacture. They may not use the water of a stream in an unreasonable manner, and defile the same in such a way or to such an extent as to amount to the invasion of the rights of other riparian owners. The latter are clearly entitled to redress for such acts by a suit at law and, in case the nuisance be continued,

[1] *Semble* Peterson *v.* Santa Rosa (Cal.), 51 Pac. Rep. 55 [1897].

[2] Morgan *v.* Danbury, 67 Conn. 484.

[3] 28 Amer. & Eng. Ency. Law 976, *and cases cited;* Brewster *v.* Rogers Co. 42, App. Div. 343 [1899]. *logging in streams.*

[4] Joplin Min. Co. *v.* Joplin (Mo. Sup.), 27 S. W. Rep. 406.

[5] 28 Amer. & Eng. Ency. Law 974, *and cases cited.*

[6] Atty.-Gen'l *v.* Hackney Board (Eng.), L. R. 20 Eq. 626; Kellogg *v.* New Britain, 62 Conn. 232; *semble* Indianapolis W. Co. *v.* Amer. Strawboard Co. (C. C.), 57 Fed. Rep. 1000.

[7] Good *v.* Altoona (Pa. Sup.), 29 Atl. Rep. 741.

to a summary relief by injunction. This is the law established by a great number of American and English cases. The right of a riparian owner to a natural stream of water flowing by or through his land continues except so far as it may have been granted away or lost by adverse user. No adverse user short of the period required by prescription will confer any exclusive right to the use of running water. If the prior owner has enjoyed the use of water in any particular way, as for manufacture or trade for the prescriptive period (twenty years in some states) so as to have acquired a right thereto, he is then entitled to remain undisturbed in such use, but only in the manner and to the extent defined by the actual enjoyment of the use. If occupation, taking, or using of water has existed for so long a time as may raise the presumption of a grant, other riparian owners must take a stream subject to such diminution of quantity and corruption of the quality as he has enjoyed for the full prescriptive period.[1]

A city or person may acquire a right to the use of a stream, as for the discharge of a sewer, by prescription;[2] but not after the waters of the stream have been taken for a water-supply for a city.[3] The amount of sewage that can be discharged will be limited to what it was when the prescriptive period commenced. If, as is usual, the pollution has substantially increased with the growth of the city, either gradually or suddenly, and within the prescriptive period, then the right to pollute the stream will be curtailed by the amount of the increase.[4] This increase in the discharge of sewage from a city and consequent pollution of waters may be anticipated and considered by the court in granting an injunction restraining such contamination, even though the pollution at present does not amount to a nuisance.[5] To constitute an adverse user sufficient to sustain a right by prescription to maintain a nuisance, it must have been continued in substantially the same way and with equally injurious results for the entire statutory period.[6]

A prescriptive right to pollute a stream will be limited also to the same kind and class of impurities which have been discharged into the stream for the full statutory period. An allegation that defendant had by prescription acquired a right of "causing to flow into the waters . . . factory- and house-sewage, drainage, and storm- and surface-waters from the city's streets," is not a sufficient answer to a complaint that "large quantities of acids, impure matter, sewage, and other noxious and impure substances were caused to flow into a stream so as to render the waters of the said brook filthy." The defense was held not to include the whole use complained of, and that

[1] Beasley *v.* Shaw, 6 East 208.

[2] 3 Kent's Com. 446; Kranz *v.* Baltimore, 64 Md. 491.

[3] Martin *v.* Gleason, 139 Mass. 183.

[4] Blackburne *v.* Somers, L. R. 5 Ir. 1; Goldsmid *v.* Tunbridge Commrs., 1 Eq. 161; Woodworth *v.* Genesee Paper Co. (Sup.), 46 N. Y. Supp. 99; Mississippi Mills Co. *v.* Smith (Miss.), 11 So. Rep. 26.

[5] Goldsmid *v.* Tunbridge Commrs. (Eng.), 1 Eq. 161, 1 Ch. 349.

[6] Matthews *v.* Stillwater Co. (Minn.), 65 N. W. Rep. 947; Woodworth *v.* Genesee Paper Co. (Sup.), 46 N. Y. Supp. 99.

plaintiff could recover for uses alleged in the complaint and not included in the defense.[1]

The pollution of a stream supplying water to a city is a public nuisance, and therefore the right to empty a sewer into such stream cannot be acquired by prescription.[2] The rule that a right to maintain a nuisance cannot be acquired by prescription applies only to public, and not to private, nuisances.[3]

Where a city uses a stream as an open sewer, it cannot acquire by prescription a right to neglect its duty to keep open the channel and to remove accumulations of refuse therein.[4]

Where a city, under power of eminent domain, takes the waters of a pond and streams and the land about the pond for the supply of pure water, it may take also the prescriptive right of landowners to pollute the waters of the streams flowing into the lake and through the lands taken. The city can even take the prescriptive right to pollute the waters of one of the streams without taking the land through which it flows. An instrument that recites that a city took all the waters of a pond, "and other brooks and streams, whether permanent or temporary, entering into the same, . . . and all the water rights thereunto belonging or in any wise appertaining, for the sole use and benefit of the city," takes the right to foul the waters of any of the streams existing at the time of filing the instrument.[5]

An instrument granting permission "for all future time" to a manufacturing company to flow obnoxious matter into a certain stream, which describes the land through which the stream flows as in a certain county, adjacent to the manufacturing company's works, and is supported by a valuable consideration, is sufficient to create an easement.[6]

213. Parties to Suit to Prevent Pollution.—The facts that the riparian owner purchased the land after the nuisance was established, and that his motives were bad, or that his object in making the purchase was to prevent the defendant from discharging its waste into the stream, to his great injury, are not material to the case. One has a perfect right to buy land, and takes all the vendor's rights in a stream appurtenant to the land and is entitled to enforce them.[7] Even when the defendant was the vendor and had a prescriptive right to discharge impurities into the stream, it was held that the purchaser could restrain the further contamination of the waters; that the vendor must have reserved an express right to foul the stream, and not having done so, it would be prohibited.[8]

[1] Nolan *v.* New Britain (Conn.), 38 Atl. Rep. 703.

[2] Kelley *v.* City of New York (Sup.), 27 N. Y. Supp. 164; Litchfield *v.* Whitenack, 78 Ill. App. 364.

[3] Drew *v.* Hicks (Cal.), 35 Pac. Rep. 563.

[4] Owens *v.* City of Lancaster (Pa. Sup.), 37 Atl. Rep. 858.

[5] Martin *v.* Gleason, 29 N. E. Rep. 664, 139 Mass. 183.

[6] Nunnelly *v.* Southern Iron Co. (Tenn.), 29 S. W. Rep. 361.

[7] Townsend *v.* Bell (Sup.), 17 N. Y. Supp. 210.

[8] Crossley & Sons *v.* Lightowler, 3 Eq. 279, 2 Ch. 478.

In a suit by riparian owners to enjoin the discharge of city sewage into a river, the owners of the houses connected with the sewers are not necessary parties. Owners of different parcels of land on the banks of a river may join as plaintiffs to enjoin the discharge of sewage polluting the river.[1]

The defendant having denied all the allegations that he was polluting or had polluted a stream, it is error to put the burden of proof upon him without any inquiry as to whether the waters were polluted by him.[2]

214. Pollution of Stream by Joint Wrongdoers.—When several parties or persons acting independently of one another discharge or deposit refuse matter and *débris* into a stream, fouling the same, they all may be joined as defendants in an action to restrain the nuisance.[3] It is error to hold in such case that any one person is liable for the combined results of all the deposits or fouling. If others on the stream have contributed to the pollution, the defendant should not be held liable for the injury done by them. His part of the wrong done must be determined by the best proof the nature of the case affords.[4] It may be shown that other persons were making deposits in the stream above plaintiff's property, defendant not being liable for the separate wrong of another.[5] If the plaintiff himself contributes to the pollution and injuries of which he complains, he cannot recover from an upper riparian owner for his part in the wrong.[6]

In a suit by a riparian owner to enjoin the pollution of a stream, the fact that part of the stream is in a measure polluted by others besides the defendant,[7] or that the stream was always more or less polluted from other mines, and from the washing of plowed fields, public roads, and railroad embankments,[8] is no reason why a particular cause or source shall not be restrained.[9]

215. Liability for Defective Sewers.—A city must construct its sewers so that they shall not become nuisances,[10] and is liable if they be so unskillfully built that they become obstructed and cause water to set back and flow plaintiff's lands or cellars.[11]

The pollution of a stream may be the necessary result of the construction of a sewer, and may have been anticipated; or it may arise from defects in the design of the system or the faulty construction of the sewer itself. In

[1] Grey *v.* City of Paterson (N. J. Ch.), 42 Atl. Rep. 749.

[2] Tennessee C. I. & R. Co. *v.* Hamilton (Ala.), 14 So. Rep. 167. *See also* Tiede *v.* Schneidt (Wis.), 74 N. W. Rep. 798.

[3] Lockwood *v.* Lawrence, 77 Me. 297.

[4] Blaisdell *v.* Stephens, 14 Nev. 17; Gould *v.* Stafford (Cal.), 18 Pac. Rep. 879; Little Schuylkill Nav. Co. *v.* Richards, 57 Pa. St. 142; Seely *v.* Alden, 61 Pa. St. 306; Chipman *v.* Palmer, 77 N. Y. 51 [1879].

[5] Tennessee Coal, Iron & R. Co. *v.* Hamilton (Ala.), 14 So. Rep. 167.

[6] Ferguson *v.* Firmenich Mfg. Co., 77 Iowa 576.

[7] Townsend *v.* Bell (Sup.), 17 N. Y. Supp. 210; McKeon *v.* See, 51 N. Y. 300.

[8] Beach *v.* Sterling I. & Z. Co. (N. J. Ch.), 33 Atl. Rep. 286; Hill *v.* Smith, 32 Cal. 166.

[9] Blair *v.* Deakin (Eng.), 57 L. T. N. S. 522; Crossley *v.* Lightowler (Eng.), L. R. 2 Ch. 478; St Helens S. Co. *v.* Tipping, 11 H. L. Cas. 642. *See* Tiede *v.* Schneidt (Wis.), 74 N. W. Rep. 798.

[10] Conrad *v.* Ithaca, 16 N. Y. 161.

[11] Rome *v.* Portsmouth, 56 N. H. 291; Jacksonville *v.* Lambert, 62 Ill. 519; New Albany *v.* Lines (Ind. App.), 51 N. E. Rep. 346 [1898]. *And see* Cohen *v.* Bellenot (Va.), 32 S. E. Rep. 455 [1899].

either case the city or owner of the sewer is liable for the unlawful fouling of the stream, and even when the discharge of a sewer into a stream is authorized by act of legislature it or he may be held responsible if the pollution complained of is caused by the faulty construction or unreasonable use of the sewer.[1]

216. Pollution of Watercourses by Mills, Factories, and Works.—The pollution of streams by the operation of large industrial plants is one of the most frequent causes of litigation. The large amount of capital invested, and the great benefit which such manufacturing establishments are to a community, make such acts seem tolerable when they would not otherwise be so. To have a mill, employing thousands of men and women, shut down and a great industry closed because some small farmer or fisherman, owning perhaps a few acres of wild land, has suffered an imaginary loss in drinking-water for his small herd of cattle, or in his enjoyment of fishing a few times a year, seems the rankest injustice. Yet these cases are made the subject of suits for blood-money by short-sighted landowners and lawyers wanting practice. Still, however much money may have been invested, or however much the community may suffer as against the right of a riparian proprietor to have water flow in its natural purity, there is no public policy in favor of industrial development which will justify the erection and operation of a factory that pollutes the water of a stream, unless the most modern appliances are used to prevent it.[2] It is no defense to a bill by a riparian proprietor to restrain the pollution of a stream by discoloration, that the discoloration was the natural and necessary result of mining operations prosecuted in the ordinary way.[3] It is a principle of the common law that the erection of anything in the upper part of a stream of water which poisons, corrupts, or renders it offensive and unwholesome is actionable; and this principle not only stands with reason, but is supported by unquestionable authority, ancient and modern.

Mills and factories using drugs and chemicals, as dyestuffs, are a very common and dangerous source of contamination,[4] which may be restrained by injunction.[5]

With respect to the discharge of chemicals into a stream, it has been held that the one who is the proximate or immediate cause of the pollution of the waters may be enjoined where the obnoxious effect is caused by the combination of the stuff discharged, which is harmless and inoffensive alone, with other

[1] 28 Amer. & Eng. Ency. Law 976, *and Massachusetts cases cited;* Grey *v.* Paterson (N. J. Ch.), 42 Atl. Rep. 749 [1899]. *See* Litchfield *v.* Southworth, 67 Ill. App. 398 [1896].

[2] Indianapolis Water Co. *v.* American Strawboard Co. (C. C.), 57 Fed. Rep. 1000; Mississippi Mills Co. *v.* Smith (Miss.) 11 So. Rep. 26.

[3] Beach *v.* Sterling Iron & Zinc Co. (N. J. Ch.), 33 Atl. Rep. 286.

[4] Holsman *v.* Boiling Springs B. Co., 14 N. J. Eq. 335; Crossley *v.* Lightowler (Eng.), L. R. 2 Ch. 478. *See also* (Eng.) 9 Rep. 59; (Eng.) Co. Litt. 200 b.

[5] Richmond Mfg. Co. *v.* Atl. De Laine Co , 10 R. I. 106; Townsend *v* Bell (Sup.), 17 N. Y. Supp. 210; Mississippi Mills Co. *v.* Smith (Miss.), 11 So. Rep. 26; Howell *v.* McCoy (Pa.), 3 Rawle 268; Cushman *v.* Highland Ditch Co. (Colo. App.), 33 Pac. Rep. 344.

substances wrongfully deposited in the stream by other persons.[1] Poisonous and corrosive substances which injure the machinery of a lower riparian owner may not be discharged into a stream;[2] nor those that render it unfit for special processes of manufacture, such as carpet-weaving and dyeing[3] or paper-making.[4]

An upper landowner, who, by drilling a well and pumping, has increased the aggregate quantity of water discharged, and changed its character from fresh to salt, whereby it became more injurious to the lower land, is liable to the owner of the latter for such injuries, though such water is discharged in the lawful use of his land, unless he could not prevent the injury by reasonable care and expenditure.[5] But one who sinks an artesian well on his own land and uses the water to bathe the patients in a sanitarium erected by him on said premises was held not liable to injunction and damages for allowing the water, after such use, to flow into a stream which crosses the land of an adjoining owner and is the only natural and available outlet.[6]

217. Pollution from Mining Operations.—Mining operations usually furnish large quantities of refuse material in the form of screenings, tailings, and discoloration. Such refuse cannot be discharged into running streams, destroying their usefulness to other riparian owners,[7] as in filling up the channel and causing the *débris* to be deposited on land.[8] If such refuse be carried upon others' lands by the natural flow of the stream, though in times of high water during rainy seasons, the mine-owner will be held liable for the injury.[9] It is no excuse that the refuse was deposited in the stream to make room for a retaining-wall to prevent a large bulk of the refuse from being washed down on the land of the owners below.[10]

218. Instances in Befouling a Stream.—Water made muddy by the construction of a water-works reservoir and dam, to the injury of the owner of dye-works, may be a nuisance.[11] Deposits of materials (coal-slack) which constituted a railroad embankment have been held to be nuisances.[12] Sand and silt contained in surface-water discharged into streams have been held not deleterious matter within the English Public Health Act 1875, § 17, pro-

[1] Morgan *v.* Danbury, 67 Conn. 484.

[2] Pennington *v.* Brinsop H. C. Co., 5 Ch. Div. 769; Lingwood *v.* Stowmarket Co. (Eng.), L. R. 1 Eq. 77.

[3] Carhart *v.* Auburn Gas. Lt. Co. (N. Y.), 22 Barb. 297; Richmond Mfg. Co. *v.* Atl. De Laine Co., 10 R. I. 106.

[4] Hodgkinson *v.* Ennon, 4 B. & S. 229.

[5] Pfeiffer *v.* Brown (Pa. Sup.), 30 Atl. Rep. 844.

[6] Barnard *v* Shirley (Ind.), 47 N. E. Rep. 671 [1897]; s.c., 34 N. E. Rep. 600 [1893].

[7] 28 Amer. & Eng. Ency. Law 977.

[8] Tennessee Coal, Iron & R. Co. *v.* Hamilton (Ala.), 14 So. Rep. 167 [1893]; Montana Co. *v.* Gehring (C. C. A.), 75 Fed. Rep. 384.

[9] Robinson *v.* Black D. C. Co., 57 Cal. 412; Tennessee Coal I. & R. Co. *v.* Hamilton (Ala.), 14 So. Rep. 167; Hindson *v.* Markle (Pa. Sup.), 33 Atl. Rep. 74; Hill *v.* Smith, 32 Cal. 166.

[10] Elder *v.* Lykens Val. Coal Co. (Pa. Sup.), 27 Atl. Rep 545.

[11] Clowes *v.* Sterling I. & Z. Co. (N. J. Ch.), 33 Atl. Rep. 286; *semble* Beach *v.* Sterling I. & Z. Co. (N. J. Ch.), 33 Atl. Rep. 286, discolorations from clay. *See* Rarick *v.* Smith (Com. Pl.), 17 Pa. Co. Ct. Rep. 627.

[12] Wabash R. Co. *v.* Sanders, 58 Ill. App. 213.

hibiting the discharge of surface-waters containing foul or noxious matter which will deteriorate the quality and purity of the waters of a stream, where the stream is already charged therewith.[1] Light flocculent matter discharged into navigable waters, and carried in suspension into the ocean, may be a nuisance where Congress has prohibited the putting such matter into such waters.[2]

219. Injunction Granted when No Damages are Suffered.—It is frequently held that a riparian owner need not have suffered actual damages in order to be entitled to an injunction to prevent the befouling and discoloring of a stream, where such use of a stream, if not stopped, may grow into a right by prescription.[3] Moreover, the rights of a riparian owner are not limited to the present modes of use and enjoyment. It is impossible to foresee what use the owner or his successors in title may resort to, or the extent of damages which would compensate him or them for the injuries which the continued pollution might cause to such new modes of enjoyment.[4]

In determining the right to an injunction to prevent further pollution, the court will consider the consequences of an injunction and the real equities of the case. If the injury is only occasional and the damage is small and accidental rather than a probable and necessary consequence, an injunction will be denied.[5]

A city will not be enjoined from continuing to discharge sewage into a river until it has had a reasonable time to provide other means to dispose thereof.[6] Pending a hearing, an injunction may be granted restraining the city from increasing the discharge, where the potableness of the water is destroyed and noxious smells arise from the polluted water which produce general discomfort to the inhabitants along the river.[6]

220. Person Injured Not Required to Prevent Pollution.—The lower riparian owner is not without remedy because he has failed to take due precautions to prevent the injury resulting from the discharge of impurities into the stream, or that he has been guilty of negligence contributing to the injury, where there is no duty imposed upon him to prevent it.[7] Such a plea is no defense to an action.

A city is not bound to maintain structures to preserve the purity of its water-supply. And it is no defense to a bill for an injunction to prevent a person from polluting such a source of water-supply that the city has already built a dam which prevents such pollution.[8]

[1] Durant *v.* Branksome, etc. (C. A.), L. R. 2 Ch. 291 [1897].
[2] United States *v.* N. B. Gravel-Min. Co. (C. C. Cal.), 81 Fed. Rep. 243.
[3] Townsend *v.* Bell (Sup.), 17 N. Y. Supp. 210; Ware *v.* Allan, 140 Mass. 513. *And see* Gould *v.* Eaton (Cal.), 49 Pac. Rep. 577.
[4] Pennington *v.* Brinsop Hall Co. Eng.), 5 Ch. Div. 769.
[5] Peterson *v.* Santa Rosa, 51 Pac. Rep. 557.
[6] Grey *v.* City of Paterson (N. J. Ch.), 42 Atl. Rep. 749 [1899].
[7] Tennessee Coal, I. & R. Co. *v.* Hamilton (Ala.), 14 So. Rep. 167.
[8] Martin *v.* Gleason, 139 Mass. 183.

If the expense of preventing the damage is small in proportion to the gain to the upper landowner, and the person damaged has taken steps to abate the nuisance, the upper landowner should pay the expense, if it is reasonable in regard to the lower owner's rights, however large it may be in actual amount, or he should respond in damages.[1] An appropriator of water who is being injured by the unlawful acts of another user cannot be compelled to protect himself from such injury at his own cost, on the ground that he can do so at less expense than must be incurred by the wrongdoer for its prevention.[2]

A riparian owner has no right to have the sewage of a city turned into the stream above his mill, instead of being diverted elsewhere, although from one third to one half of the stream has been taken by the city without right and has entered the sewerage system; but the disposal of the sewage is under the control of the city, and the remedy of the riparian owner for wrongfully taking the water is by action for damages or by injunction.[3]

221. Pollution by Refuse from Gas-works.—The discharge of tar and oily substances from gas-works to the detriment of other manufactures on the stream, such as carpet-works,[4] will be enjoined and damages assessed. A city has been held liable for damages to a well from the erection of a gas-reservoir.[5]

In an action for damages suffered from pollution of a stream, as by refuse from a gas-works, it is no excuse that the soil is pervious and the waters of the stream percolate it without the agency or fault of the defendant.[6]

222. Pollution of Streams with Refuse from Sawmills and Tanneries.—Sawmills and tanneries afford refuse materials which, though not harmful in small quantities, become deleterious when the amount is large. The manifold ways in which wood products are now utilized, and the rigid economy which is practiced to turn every waste material to some profit, does away with much of the fouling of streams by wood waste. The emptying of offensive matter from tan-yards,[7] or the discharge of spent bark from a tannery into a stream so that it lodges on the premises of riparian owners,[8] or of sawdust, slabs, and edgings from a saw-mill,[9] which render the water impure and unfit for

[1] Pfeiffer *v.* Brown (Pa. Sup.), 30 Atl. Rep. 844.

[2] Suffolk Gold Mining Co. *v.* San Miguel Mining Co. (Colo. App.), 48 Pac. Rep. 828.

[3] Fisk *v.* Hartford, 69 Conn. 375; 37 Atl. Rep. 983; Schriver *v.* Johnston (N. Y.), 71 Hun. 232.

[4] Carhart *v.* Auburn Gas Lt. Co. (N. Y.), 22 Barb. 297; Commonwealth *v.* Russell (Pa.), 33 Atl. Rep. 709.

[5] Shutter *v.* The City, 3 Phila. 228 [1858].

[6] Carhart *v.* Auburn Gas Lt. Co. (N. Y.), 22 Barb. 297. *See* Shutter *v.* The City, 3 Phila. 228 [1858].

[7] Honsee *v.* Hammond (N. Y.), 39 Barb. 89; Thomas *v.* Brackney (N. Y.), 17 Barb. 654; Howell *v.* M'Coy (Pa.), 3 Rawle 256; Moore *v.* Webb (Eng.), 1 C. B. N. S. 673; Aldred's Case (Eng.), 9 Co. Rep. 58, 59, *a lime-vat.*

[8] Winchester *v.* Osborne, 61 N. Y. 555, *reversing* 62 Barb. 337; Seeley *v.* Alden, 61 Pa. St. 302; Crosby *v.* Bessey, 49 Me. 539. *And see* Washburn *v.* Gilman, 64 Me. 163.

[9] Lockwood Co. *v.* Lawrence, 77 Me. 297 [1885]; Snow *v.* Parsons, 28 Vt. 459; Waterman *v.* Buck, 58 Vt. 519; Hayes *v.* Waldron, 44 N. H. 580; Green *v.* Gilbert, 60 N. H. 144; State *v.* Griffin (N.

domestic purposes,[1] or dam, obstruct, and set back the waters to the injury of a lower owner,[2] is an act which will be enjoined and for which damages may be recovered.[3]

223. Measure of Damages for Pollution of Waters.—Ordinarily a riparian owner may recover from the person or party who pollutes a stream such damages as he has actually suffered and can show. Such damages may include injuries due to bodily sickness and discomfort.[4] He may recover for all the expense incurred by reason of sickness, in addition to loss of rent of the premises.[5]

The value of a spring which was destroyed may be shown.[6] Where a water privilege has been destroyed, the measure of damages has been held to be the difference in value of the land immediately before and after the destruction.[7] When the fouling of water makes it unfit for use and thereby obstructs the full enjoyment of the owner, and it is agreed to compute the damages, an injunction may be held necessary to prevent a multiplicity of costs.[8]

Usually the question of damages is left to the jury; and the instruction by the court that the cost of cleaning out sediment deposited by water from a mill in the tiles and lateral ditches could not be considered by the jury in assessing damages if such sediment was of such nature that it would have been washed out of the tiles or ditches by water flowing in them, invades the province of the jury by assuming to control them upon a question of fact.[9]

The jury may consider the use of the property and the plaintiff's health and comfort, and use their best judgment in deciding what amount plaintiff is entitled to, if anything.[10]

In estimating the damages it is not necessary that any witness express an opinion as to the amount of such damages. The jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation, and experience in the business affairs of life.[11] If land has been injured by reason of deposits upon it, evidence may be given as to the diminished value of the land, and also of the cost of removing the deposits.[12]

H.), 39 Atl. Rep. 260 [1897]; People *v.* Rogers, 12 Colo. 278; Potter *v.* Froment, 47 Cal. 165; State *v.* Kronert (Wash.), 43 Pac. Rep. 876. *But see* Jacobs *v.* Allard, 42 Vt. 303, which held that a mill-owner might discharge sawdust into a stream in a reasonable manner.

[1] Potter *v.* Froment, 47 Cal. 165.

[2] Winchester *v.* Osborne, 61 N. Y. 555.

[3] O'Reiley *v.* McChesney (N. Y.), 3 Lans. 278; Indianapolis W. Co. *v.* Amer. St. Co., 53 Fed. Rep. 970.

[4] Ferguson *v.* Firmenich Mfg. Co., 77 Ia. 576; Randolph *v.* Bloomfield, 77 Ia. 50; Shiveley *v.* Cedar Rapids, etc., R. Co., 74 Ia. 170; Gladfelter *v.* Walker, 40 Md. 1; Eufaula *v.* Simmons, 86 Ala. 515; Litchfield *v.* Whitenack, 78 Ill. App. 364 [1897].

[5] Loughran *v.* Des Moines, 72 Ia. 384. *But see* Esson *v.* Wattier (Oreg.), 34 Pac. Rep. 756.

[6] Mississippi Mills Co. *v.* Smith (Miss.), 11 So. Rep. 26.

[7] Galveston, H. & S. A. Ry. Co. *v.* Haas (Tex.), 37 S. W. Rep. 167.

[8] Peterson *v.* Santa Rosa, 51 Pac. Rep. 557.

[9] Prairie State P. Co. *v.* Sharp, 67 Ill. App. 477.

[10] Gavigan *v.* Atlantic Refining Co. (Pa.), 40 Atl. Rep. 834 [1898].

[11] Litchfield *v.* Whitenack, 78 Ill. App. 364.

[12] Seely *v.* Alden, 61 Pa. St. 302.

CHAPTER XIII.

NAVIGABLE WATERS. PUBLIC AND PRIVATE RIGHTS IN NAVIGABLE WATERS.

231. Navigable Waters.—At common law navigable waters were those waters in which the tide ebbs and flows. This is the sense in which the term is still used in England and in the earlier decisions in this country. In America, in the most approved modern sense of the term, navigable waters include those which afford a channel for useful commerce, and such waters are public highways of common right.[1] The common-law definition was a reasonable one in England, where there are no rivers of considerable importance in which the tide does not ebb and flow, but in this country it would be highly unreasonable to apply such a rule to the great rivers, such as the Mississippi, Missouri, Ohio, Allegheny, Delaware, Schuylkill, Susquehanna, etc., and their branches. It has been held that it is the navigability *in fact* which forms the foundation for navigability *in law*, and from that fact follows the appropriation to public use, and hence its public character and legal navigability. It would be impossible to attempt to apply a common-law rule to the rivers of this country stretching about three thousand miles in extent, flowing through or between numerous independent states, and bearing commerce which competes with that of the ocean. A test which was applicable to an island not so large as some of our states, and to streams whose utmost length was less than three hundred miles and whose oultet and source at the same time could be within the same states' jurisdiction, could not be applied to a continent like our America.[2]

The Roman law which has pervaded continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so; and this common-sense view has been adopted in this country. A stream is regarded as navigable which is capable of floating to market the products of the country through which it passes and upon which commerce may be conducted, and from the fact of its being navigable it becomes in law a public river or highway.[3] The public easement is not

[1] 16 Amer. & Eng. Ency. Law 236, *many cases.*

[2] *See comment by Woodward in* McManus *v.* Carmichael, 3 Iowa 1 [1856].

[3] Hichok *v.* Hine, 23 Ohio St. 523. *See also* 28 Alb. Law Jour. 4.

founded upon usage, custom, or prescription. Any stream capable of being generally and commonly useful for some purposes of trade and of transportation of property, whether by steamers or sailing-vessels or rowboats or rafts, is a public stream.[1]

The question as to the nature and extent of the rights of riparian owners upon navigable waters, including the right to the continued flowage of the stream, is one to be decided by the courts of the state as a matter of local law, subject to the right of Congress to regulate public navigation and commerce.[2] However, a provision declaring the Mississippi River a common highway for the inhabitants of the state and all other citizens of the United States does not impair the title and jurisdiction of the state over the navigable waters within her boundaries, any more than rights of that nature are limited with regard to the thirteen original states.[2]

The sovereignty of the state of Wisconsin extends to the middle of Lake Michigan, and its laws, so far as not in conflict with the laws of the United States which are passed in regulation of commerce and navigation, are operative within the boundaries of that state.[3]

232. Uses of Navigable Streams.—In order that waters may be navigable in the legal sense, the commerce which is carried over them must be of an essentially valuable character. This language, however, is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it may be actually applied in order to give it the character of a navigable stream or highway. A traveler for pleasure is as fully entitled to protection in using a public highway, whether by land or by water, as is a traveler for business.[4] However, it has been held that the fact that a river was used for pleasure-boating and fishing after a dam had been erected across it was no proof whatever that it was navigable.[5]

A cove or stream cannot be said to be navigable because at times of freshet a boat or skiff or Indian canoe may be pushed through its waters, or in the winter months occasionally a small boat is hauled up to escape the ice. Those waters are navigable where the public pass and repass upon them with vessels or boats in the prosecution of a useful occupation. There should be some commerce or navigation which is essentially valuable. A hunter or fisherman by drawing his boats through the waters of a brook or shallow creek does not create navigation or constitute them rivers of commerce.[6] It has been held that the property which is the subject of such commerce must be conducted by the agency of man.[7]

[1] Carter *v.* Thurston, 58 N. H. 104.

[2] St. Anthony Falls W.-p. Co. *v.* Board of Water Comrs., 18 Sup. Ct. Rep. 157; 158 U. S. 349 [1897].

[3] Bigelow *v.* Nickerson (C. C. A.), 70 Fed. Rep. 113.

[4] *Chapman, Ch. J., in* Atty. Genl. *v.* Woods, 108 Mass. 439.

[5] Burrows *v.* Whitwan, 59 Mich. 279; Wethersfield *v.* Humphrey, 20 Conn. 217.

[6] Wethersfield *v.* Humphrey, *supra.*

[7] Munson *v.* Hungerford, 6 Barb. N. Y. 265. *But see* Morgan *v.* King, 18 Barb. N. Y. 227.

For a stream to be navigable it is not necessary that commerce should be conducted by means of boats and vessels. If the waters are capable of floating rafts and logs, they are public highways for that purpose. Waters need not be fit for navigation at all times, but their navigability should recur with regularity and at known periods.[1] The seasons of navigation must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse.[2]

233. Navigability does Not Depend upon Improvements.—The navigability of a stream should not depend upon its susceptibility to improvement by high engineering skill and an expenditure of large sums of money. It should be navigable in its present natural condition.[3] A stream of water which is not susceptible of use as a highway in its natural state is absolutely private, and that made capable of floating commercial products by the owner by artificial means is not a subject of public use.[4] The weight of authority limits the term navigability to waters having a natural and inherent capacity for navigation. A stream which can only be made floatable by artificial means is in no sense a public highway.[5] Streams which are not fit for floating logs do not become public thoroughfares when improved by riparian owners.[6]

If, however, the waters of a stream have been diverted from their natural course into a new channel, the public may use it for floatage, presumably to the same extent that it was useful before the diversion.[7] The same is true of a new channel created by a break in the dam.[8] In South Carolina the court refused to charge that an individual has such an exclusive right to a non-navigable river that the legislature may not declare it to be a public highway, and that when the obstructions are removed it becomes fit for public use.[9]

234. Rule in Several States.—North Carolina courts have made the test of navigability the capacity to afford passage for sea-going vessels. This rule has been modified of late, and the tendency seems to be towards the general rule.[10] A Michigan court has made the test of navigability the actual use and not the capacity for use. The existence of a current is not the test of a navigable river. It may be navigable without a current.[11] In Tennessee a stream is held not navigable which is not of sufficient depth naturally to float rafts, boats, and small vessels.[12]

[1] 16 Amer. & Eng. Ency. Law 243.

[2] United States *v.* Rio Grande D. & I. Co. (N. M.), 51 Pac. Rep. 674 [1898].

[3] Wadsworth *v.* Smith, 11 Me. 278.

[4] United States *v.* Rio Grande D. & I. Co., *supra*.

[5] Moore *v.* Sanborne, 2 Mich. 519.

[6] Wadsworth *v.* Smith, 11 Me. 278; Holden *v.* Robinson Mfg. Co., 65 Me. 215; Nutter *v.* Gallagher (Ore.), 24 Pac. Rep. 250 [1890]. *And see* Haines *v.* Hall, 17 Ore. 165.

[7] Dwinel *v.* Barnard, 28 Me. 544; Dwinel *v.* Veazie, 44 Me. 167; Regina *v.* Betts (Eng.), 44 Cox (C. C.) 211.

[8] Whisler *v.* Wilkinson, 22 Wis. 572 [1868].

[9] Cates *v.* Wadlington (S. C.), 1 McCord 583.

[10] 16 Amer. & Eng. Ency. Law 244. *But see* State *v.* Eason (N. C.), 19 S. E. Rep. 88.

[11] Turner *v.* Holland, 54 Mich. 300; 65 Mich. 453; Burrows *v.* Whitwan, 59 Mich. 279.

[12] Irwin *v.* Brown (Tenn.), 12 S. W. Rep. 340 [1889].

A stream may be navigable which does not afford a continuous passage for water-craft or logs throughout its entire extent.[1] The Niagara River is a navigable river notwithstanding the obstruction of the falls.[2]

Whether or not a body of water is navigable is a question of fact for the jury.[3] When determined it becomes a matter of law.[4] The burden of proof is on the party alleging the stream to be navigable, but all tide-waters are presumed to be navigable.[5] Courts frequently take judicial notice of the fact that a river is navigable or unnavigable.[6]

Where marsh-land bordering on navigable waters is subject only to temporary inundation in times of heavy gales, but at other times the water standing or flowing over or through it is the mere drainage from higher lands adjoining, it does not constitute a part of the navigable waters.[7]

The right to navigate waters is generally held to be an inherent public right needing no legislative sanction which may be the subject of an express grant by the legislature. If the capacity of the stream is sufficient for actual use as a public highway, the public is entitled to enjoy such use.[8] If a stream has been used without objection for twenty years as a public thoroughfare, it becomes a navigable stream.[9]

235. Non-tidal Rivers.—A river has been held to be a natural body of water with a uniform current; a running stream of water confined on each side by walls and banks. The name is applied to waters which flow and reflow, as well as to those which have the currents one way.[10] The principal difference between a river and a lake or swamp is the presence of a current in the former, but a lake does not lose its distinctive character because there is a current in it for a certain distance leading toward the outlet.[11]

A river consists of a bed, water, and the banks or shores—shores if a tidal stream.[12] The bed is the soil occupied by the stream so as to destroy vegetation. The banks are those elevations which contain the river in its natural channel when there is the greatest flow of water.[13] The bank is that distinguished margin where vegetation ceases, and the shore is the pebbly, sandy, or rocky space between that line and the low-water line.[14] The bank of a river is that

[1] 16 Amer. & Eng. Ency. Law 244.
[2] *Re* State Reservation Comm., 37 Hun (N. Y.) 537; St. Anthony Falls W. P. Co. *v.* Board, 158 U. S. 349; 18 Sup. Ct. Rep. 157.
[3] Jones *v.* Johnson (Tex.), 25 S. W. Rep. 650; 16 Amer. & Eng. Ency. Law 245.
[4] Morgan *v.* King, 18 Barb. (N. Y.) 277; Rhodes *v.* Otis, 33 Ala. 578; Walker *v.* Allen, 72 Ala. 456.
[5] 16 Amer. & Eng. Ency. Law 245.
[6] Clark *v.* Cambridge, etc., Co. (Neb.), 64 N. W. Rep. 239; 16 Amer. & Eng. Ency. Law 245.
[7] Niles *v.* Cedar Point Club (C. C. A.) 85 Fed. Rep. 45 [1898].
[8] Healy *v.* Joliet R. Co., 2 Ill. App. 435; Martin *v.* Bliss, 5 Blackf. (Ind.) 35.
[9] Stump *v.* McNairy (Tenn.), 5 Humph. 363.
[10] 16 Amer. & Eng. Ency. Law 249, *And see* Woolrych on Waters, 40, *and* Callis on Sewers, 77.
[11] State *v.* Gillman, 14 N. H. 476; Trustees and School *v.* Schroll, 120 Ill. 59.
[12] Child *v.* Starr, 4 Hill. (N. Y.) 369; Haight *v.* Keokuk, 4 Ia. 199.
[13] Howard *v.* Ingersol, 13 How. (U. S.) 426.
[14] McCullough *v.* Wainwright, 14 Pa. St. 171.

rising ground above the low-water mark which is usually covered by ordinary high water. The exact limits of the bank are indefinite and indeterminate. To limit the boundaries of land by the bank or shore of the stream is to define it in a very undefined and extraordinary manner. It affixes no precise point of locality, for the bank of the river extends, or may extend, over a considerable space.[1] The bank and the water are correlative; a person cannot own the one without touching the other.[2]

Neither the line of ordinary high-water mark nor that of ordinary low-water mark can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks and ascertaining where the presence and action of water are so common and usual and so long-continued as to mark upon the soil of the bed a character distinct from that of the bank in respect to vegetation as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below or at the middle stage of water must depend upon the character of the stream.[3] *

236. Rights of Public in Navigable Waters.—Navigable waters have been divided into two classes, public and semi-public, the distinction being due to the ownership. Public navigable waters are those the soil beneath which is common property. The public has not only the right of navigation, but all the other rights incident to ownership, such as fishing and gathering ice, seaweed, sand, gravel, etc. To this class belong (1) tide-waters, including the sea and its arms and tidal rivers; (2) in many states all fresh-water rivers and lakes which afford capacity for valuable floatage. The open sea has always been held the common property of all nations. A government is held to have dominion adjacent to its coasts for a distance equal to the range of cannon, or formerly about three miles. The range of cannon is taken as the measure of distance, on the principle that the dominion of the state extends only so far as it may be maintained by force from the coast. The increased range of modern ordnance would doubtless extend this three-mile limit by several fold.[4] When the seashore is indented with bays or coves, the distance is measured from a straight line drawn between the inclosing headlands.[5] The title to all tide-waters and their bays in this country is vested in the several states for the use and benefit of the public.[6]

237. As Regards Bathing.—It has been held in England that the public has no common-law right to bathe in the sea, and a person licensed to conduct a bathing establishment is not thereby warranted in placing it on a

[1] Howard *v.* Ingersol, 17 Ala. 780.
[2] Starr *v.* Child, 20 Wend. (N. Y.) 149.
[3] Howard *v.* Ingersol, 13 How. (U. S.) 380.
[4] *See* Hall's International Law 127; Field's International Code, [2d ed.] 28; The Maxim Zone, 32 Alb. Law Jour. 104.
[5] 16 Amer. & Eng. Ency. Law 248, *and cases cited.*
[6] 16 Amer. & Eng. Ency. Law 248.

* *See* Secs. 371–420, *infra.*

beach which is private property.[1] The English decisions against common-law rights to bathe in the sea were probably in reference to the use of private property for such purposes. The only practical restraint upon the privilege of sea-bathing is believed to be that which is imposed by decency and a respect for public morals.[2] Whatever the law may be with regard to bathing, there can be no question as to the rights of parties to go over private property for the purpose of bathing in the sea or catching fish. Such acts are acts of trespass.[3]

238. Navigable Inland Rivers are Usually Public Property.—In many of the states navigable inland rivers in the sense of the American decisions are public property. Grants of land bordering upon them will not convey to the middle of the stream as at common law, but are limited by banks either at high- or low-water mark, and such streams have all the general character of public waters.* In the states of Alabama, Arkansas, California, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, Oregon, Pennsylvania, Tennessee, Virginia, and West Virginia the ownership of non-tidal navigable rivers is in the public, and is subject to the control of the state. In the states of Kentucky, Michigan, New York, and North Carolina decisions have been made upholding the same doctrine, but later cases have so modified the earlier decisions that it seems justifiable to withdraw them from the group and place them under the head of semi-public streams.[4] In Connecticut, Delaware, Georgia, Illinois, Missouri, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, Vermont, and Wisconsin navigable rivers are held to be private property.

The question of the ownership of the soil under water is one which each state is at liberty to determine for itself, and if it extend the right of a riparian owner to the center of the stream, it is not for others to raise objection.[5]† In considering government land-grants the United States Supreme Court has held that the court does not hesitate to decide that Congress, in making a distinction between navigable and unnavigable streams, intended to provide that the common laws of riparian ownership should apply to land bordering upon unnavigable streams, but that the title to lands bordering upon navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public property.[6]

In many of the states of the Union the legal status of non-tidal navigable waters is an average between the law governing the tide-waters which are

[1] Mace *v.* Philcox, 15 C. B. N. S. 600.
[2] Gould on Waters, § 26; Rex *v.* Gunder, 2 Camp. 89; McManus *v.* Carmichael, 3 Ia. 1; Solliday *v.* Johnson, 38 Pa. St. 380.
[3] Hetfield *v.* Baum, 13 Ired. (N. C.) 394.
[4] *See* 16 Amer. & Eng. Ency. Law 250.
[5] Barney *v.* Keokuk, 94 U. S. 324.
[6] St. Paul, etc., R. Co *v.* Schurmeir, 7 Wall. (U. S.) 272, 288 [1868].

* *See* Secs. 401–420, *infra.*

† *See* Secs. 412–420, *infra.*

entirely public and those waters which are unfit for navigation or wholly private. Such non-tidal waters and the soil beneath them are held to be private property, but the owner's interest therein is qualified by being subject to a public easement of passage. In other words, the law which is applicable to public roads and highways is made applicable to streams.

The distinction between waters navigable in law and those merely navigable in fact, where the tide does not ebb and flow, practically only affects questions of title to the soil, rights of fishery, and the like, and not the public right of navigation.[1]

The ownership to the middle of a navigable river does not carry with it the right to the exclusive use of the water over land ordinarily covered by water, but is subordinate to the paramount easement of navigation by the public, which includes the right to use such water for navigation and commerce, and such uses as may be reasonably incident thereto.[2]

239. Waters Between States.—By virtue of the commercial powers of Congress a state exercises complete control over navigable waters entirely within its borders.[3]* When the waters of a stream constitute the borders or are between states they are subject to the concurrent jurisdiction of all. The territory of states and nations when bounded by lakes and rivers is held to extend to the center of the stream. Exception is made in the case of the Ohio, the Potomac, the Hudson, and the Chattahoochee; the control of the Ohio belonging to Kentucky, of the Potomac to Maryland, of the Hudson to New York, and of the Chattahoochee to Georgia. The stream belongs to the older state in each case.[4]

240. Public Easement of Passage over Streams is Paramount.—The public has a right of passage over all streams which have a capacity for that purpose.[5] This right includes not only navigation for boats and vessels, but also floatage and travel upon ice.[6] Navigation of waters has been held to be paramount to all other rights and interests. It is superior to fishing and to the enjoyment of an oyster-bed, and it has been held in England that it could not be destroyed by a grant.[7]

The right to make improvements for the development of the state or country has been held inferior to the rights of navigation, such as the right to lay pipes in the bed of a stream;[8] or to enjoy a ferry franchise;[9] or to engage

[1] People *v.* Jessup, 51 N. Y. Supp. 228. [1898].
[2] Pollock *v.* Cleveland Shipbuilding Co. (Sup.), 47 N. E. Rep. 582.
[3] 16 Amer. & Eng. Ency. Law 257; *see* United States *v.* Peilingham Bay B. Co. (C. C. App.) 81 Fed. Rep. 658 [1897].
[4] *See* 16 Amer. & Eng. Ency. Law 258; Tyler on Boundaries, pp. 78–80.
[5] Barnard *v.* Hinckley, 10 Mich. 459.
[6] French *v.* Camp, 18 Me. 433; State *v.* Wilson, 42 Me. 9; West Roxbury *v.* Stoddard (Mass.), 7 Allen 158; Woodman *v.* Pitman, 79 Me. 456.
[7] 16 Amer. & Eng. Ency. Law 260.
[8] Milwaukee Gas Light Co. *v.* Gamecock, 23 Wis. 144.
[9] Steamboat Globe *v.* Kutz (Ia.), 4 G. Green 433; Babcock *v.* Herbert, 3 Ala. 392.

* *See* Sec. 431, *infra*.

in fishing;[1] or to maintain a boom;[2] or a pipe-line for gas or water, or telegraph lines or cables, or a system of sewerage ;* or the right to use and maintain bridges.[3] A bridge constructed over a navigable stream without lawful authority constitutes a nuisance.[4]

In Illinois it has been held that the right of navigating a stream and the right to bridge it are coexistent.[5] When a bridge has been built across a navigable stream and a reasonably adequate passageway has been left, it is negligent and unlawful to float down a mass of logs which exceed the capacity of the passageway, to the injury of the bridge.[6]

241. Improvement of Navigation Paramount to Individual Rights.—A state may authorize improvements that shall make an unnavigable stream a navigable stream;[7] or the construction of a railroad on the Hudson River in front of docks and wharves;[8] or the filling up of arms, bayous, and sloughs of the Mississippi River, though formerly used for navigation;[9] or the taking of the water power of a navigable stream for the purpose of improving the same.[10] The state of Mississippi may improve the navigation of the Mississippi River.[11]

Riparian owners are not entitled to compensation for injuries ordinarily incident to navigation or to improvements in streams strictly navigable. They are entitled to compensation for injuries that are not directly incident to such improvement. The public has a paramount right to navigable waters which were in common navigable, and the state has an incidental power to regulate, control, and improve them as against private rights therein. This does not, however, include the authority to take the waters for other purposes, as for supplying a city without making just compensation to those who are injured.[12] Private property must not be taken nor interfered with in the improvement of navigable waters. If, in making an unnavigable stream navigable, the water-power of the riparian owner is destroyed, he is entitled to compensation.[13] It has been held that if a statute declare a river which is not

[1] 16 Amer. & Eng. Ency. Law 269. *But see* Morris *v.* Graham (Wash.), 47 Pac. Rep. 752.

[2] Miller *v.* Hare (W. Va.), 28 S. E. Rep. 722.

[3] Scott *v.* Chicago, 1 Biss. (U. S.) 510; Castello *v.* Landwehr, 28 Wis. 522; Gates *v.* N. Pac. R. Co., 64 Wis. 64; Farmers' Coöp. Mfg. Co. *v.* Albemarle, etc., R. Co. (N. C.), 23 S. E. Rep. 43.

[4] People *v.* Jessup, 51 N. Y. Supp. 228 [1898].

[5] Ill. R. Pac. Co. *v.* Peoria Bdg. Assn., 38 Ill. 467. *And see* Chicago *v.* McGinn, 51 Ill. 266.

[6] Bucki *v.* Cone, 25 Fla. 1; Mandlebaum *v.* Russell, 4 Nev. 551.

[7] Carondelet C. Nav. Co. *v.* Parker, 29 La. Ann. 430; Wisconsin Imp. Co. *v.* Manson, 43 Wis. 255.

[8] Ormerod *v.* N. Y., etc., Co., 13 Fed. Rep. 370.

[9] Ingraham *v.* Chicago, etc., Co., 34 Ia. 249.

[10] Greenbay, etc., & C.Co. *v.* Kaukauna, etc., Co., 70 Wis. 635.

[11] Withers *v.* Buckley, 20 How. (U. S.), 84.

[12] Smith *v.* Rochester, 92 N. Y. 463; 16 Amer. & Eng. Ency. Law 266.

[13] Walker *v.* Board of P. W., 16 Ohio 540.

* *See* Sec. 242, *infra*.

navigable to be a public highway and does not make any provision for compensation to riparian owners, the act does not make it so.[1]

A riparian owner on a navigable river has the right of access to the navigable part of the river from the front of his lot, and the right to build a landing.[2] The right of access across abutting tide-lands to deep water is an incident to ownership in fee of uplands in Alaska.[3]

The United States has the right to make improvements upon submerged land, necessary for the aid of navigation, without compensation to the owner thereof, and where access to the open water is thereby cut off.[4] Laws, constitutional or statutory, concerning expropriation of property, and requiring compensation therefor, have no application to property legitimately taken for levee purposes; and private injury resulting therefrom is *damnum absque injuria.*[5] The occupancy of submerged lands in a navigable river by a city for an ice-break, bridge-rest, and a draw-span for navigation purposes, and in no way interfering with the use of the lands not submerged, is not such an occupancy in law as will entitle the riparian owner to treat the city as a tenant and maintain an action for rent.[6] The owner of a naked lot bounded by navigable water is not entitled to compensation for being deprived of access thereto if the government utilizes the water-bed up to his shore-line.[7]

242. Obstruction of Navigable Waters. — Obstructions in navigable waters are *prima facie* nuisances. No amount of benefit to an indefinite number of individuals or to the community can excuse the public inconvenience resulting from an obstruction of a navigable river, and evidence of such benefit is not admissible.[8] An erection of an embankment in a port or public river is indictable if it hinder navigation, even though productive of great benefits. Lines or cables stretched across a navigable channel must be so placed as not to obstruct boats passing upon it. Crafts are not required to take precautions to avoid such lines or cables. Whether such cables are a nuisance and therefore unlawful may depend upon the circumstances of the particular case, as where a wire cable was stretched across for a guy to a ferry-boat.[9] It has been held that gas- and water-pipes stretched across a navigable stream should be buried beneath the bed, or otherwise they constitute an unlawful obstruction.[10] Telegraph cables must not be so laid as to come in

[1] Olive *v.* State, 86 Ala. 88. *And see* Town of Pierpont *v.* Loveless, 72 N. Y. 211; Morgan *v.* King, 35 N. Y. 454.

[2] People *v.* Woodruff, 51 N. Y. Supp. 515 [1898].

[3] Lewis *v.* Johnson (D. C.), 76 Fed. Rep. 476.

[4] Scranton *v.* Wheeler (Mich.), 71 N. W. Rep. 1091.

[5] Peart *v.* Meeker (La.), 12 So. Rep. 490.

[6] City of Peoria *v.* Ballance, 61 Ill. App. 369.

[7] People *v.* Revell (Ill. C. C.), 29 Chic. Leg. News 345.

[8] Gold *v.* Carter (Tenn.), 9 Hump. 369.

[9] The Vancouver, 2 Sawy. (U. S.) 81; Ladd *v.* Foster, 31 Fed. Rep. 827; The Imperial, 38 Fed. Rep. 614; The Echo, 19 Fed. Rep. 453. *Other cases cited,* 16 Amer. & Eng. Ency. Law 267.

[10] Omslaer *v.* Philadelph a Co., 31 Fed. Rep. 354; Milwaukee Gas Co. *v.* Gamecock, 23 Wis. 154. *And see* Buffalo Pipe Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y.) 107; United N. J. R. & Canal Co. *v.* Standard Oil Co., 33 N. J. Eq. 123.

contact with and annoy or delay vessels navigating the stream. Authority from the state or federal government to lay such cables under water will not justify such an interruption of navigation.[1]

The fact that a structure [weir] was erected under proper authority but afterwards becomes an obstruction to navigation makes it unlawful.[2] A wharf-owner may not place a hidden structure between high- and low-water mark if it obstructs navigation.[3] A riparian owner may not construct a jetty upon a navigable tidal river to protect his soil if navigation is or may be impeded.[4] Deposits and sewage which fill up a harbor, or a portion of it, to the obstruction of navigation, constitute a nuisance.[5] Deposits of sediment and *débris* are equally so.[6] Floating-docks, elevators, or storehouses in rivers or harbors have been held public nuisances unless authorized. Impediments which are only slight or temporary or which are incidental to the right of passage are held not actionable. If structures are located so as to afford passage for vessels, they are held not nuisances.[7] The right of navigation must be exercised with due and proper regard to the rights of others. A boat, vessel, raft, or other floating object may constitute an unlawful obstruction. Whatever is reasonably necessary to the exercise of such rights may be done if they are exercised with reasonable care. The right to occupy a highway, such as a navigable river within the jurisdiction of the city, permanently as a home, must be exercised upon such conditions as may be imposed by the state.[8]

Navigable streams are under the control of the federal government, which undertakes to control commerce and especially interstate commerce. Under the provision of the federal constitution giving Congress power "to regulate commerce," the jurisdiction of the United States over navigable waters is paramount to the title of the state to the land under the water, and therefore the ownership of such land does not include the right to erect a structure which interferes with navigation.[9] To bring obstructions and nuisances in navigable waters lying within a state within the cognizance of the federal courts there must be some statute of the United States directly applicable to such streams.[10]

[1] Stephens & Co. Transp. Co. *v.* Western Union Tel. Co., 8 Ben. 502; Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510; City of Richmond, 43 Fed. Rep. 85.

[2] Williams *v.* Wilcox, 8 A. & E. 314; United States *v.* Moline (U. S. D. C.), 82 Fed. Rep. 592 [1897], *a bridge.*

[3] White *v.* Phillips, 15 C. B. N. S. 245.

[4] Atty. Genl. *v.* Lonsdale, 7 L. R. Eq. 377.

[5] Franklin Wh. *v.* Portland, 67 Me. 46; Clark *v.* Peckham, 10 R. I. 35; Brayton *v.* Fall River, 113 Mass. 218; Washburn, etc., Mfg. Co. *v.* Worcester, 116 Mass. 458; Boston Roll. Mills *v.* Cambridge, 117 Mass. 396; United States *v.* N. Bloomfield G. Min. Co. (Cal. C. C.), 81 Fed. Rep. 243.

[6] Garitee *v.* Baltimore, 53 Md. 422; People *v.* Gold Run, etc., Co., 66 Col. 138.

[7] 16 Amer. & Eng. Ency. Law 268. *But see* People *v.* Revell (Ill. C. C.), 29 Chic. Leg. News 345, *and* Illinois C. R. Co. *v.* Illinois, 146 U. S. 387.

[8] Robertson *v.* Commonwealth (Ky.), 40 S. W. Rep. 920.

[9] Jencks *v.* Miller (Sup.), 40 N. Y. Supp. 1088.

[10] United States *v.* Bellingham Bay Boom Co. (C. C. A.), 81 Fed. Rep. 658.

Acts of Congress merely making appropriations for the improvement of a river lying within a state do not operate as an inhibition against state legislation authorizing the construction of booms, dams, piers, etc., so as to make unlawful such structures when erected under state authority.[1]

The owner either of the adjacent upland or of the soil under a stream navigable in fact, is not authorized to construct over it a bridge which interferes with navigation without the authority of the legislature or other public officers to whom the legislature has delegated the power.[2] Congress has power to order the removal of any obstruction to navigation, as a bridge, even though its construction was authorized by the state within whose boundaries it was;[3] but the jurisdiction of the United States over a navigable stream does not extend several hundred miles above the navigable portion.[4]

Congress usually requires the plan of a structure to be erected in or over a navigable stream to be approved by the Secretary of War. An act of Congress which gives authority to the Secretary of War to give notice of the alteration of bridges that he believes to be an unreasonable obstruction to navigation, and which empowers the district attorney to prosecute parties refusing to comply with such notice, is not unconstitutional as vesting the Secretary of War with either judicial or legislative powers.[5]

As Act Congress, Sept. 19, 1890, which prohibits the erection of a bridge in navigable waters without permission of the Secretary of War, excepts from its operation bridges the construction of which has been previously authorized by law, such consent is not necessary for a bridge authorized by the state legislature previous to such act.[6]

When an act of Congress makes it unlawful "to alter or modify the course, location, condition, or capacity of the channel" of any navigable waters of the United States unless such change is approved by the Secretary of War, the city of Chicago has no power to widen the Chicago River without such approval.[7]

243. Streams for Floating Logs and Timber.—Rivers and streams when of such size and channel that they may be used for the purpose of floating logs or in the transportation of any article of commerce are public highways. Any obstructions placed in such streams which will prevent such a use are public nuisances, and they may be abated by the action of a private individual who suffers some special damage not common to the community, as where one has logs then floating in the stream and which cannot pass by reason of the obstruction.[8] The use of a waterway leading from forest lands to navi-

[1] United States *v.* Bellingham Bay Boom Co., *supra*.

[2] People *v.* Jessup, 51 N. Y. Supp. 228 [1898].

[3] United States *v.* Moline (U. S. D. C.), 82 Fed. Rep. 592 [1897]. *See* Monongahela Nav. Co. *v.* U.S., 13 Sup.Ct.Rep. 622.

[4] United States *v.* Rio Grande D. & Irr. Co. (N. M.), 51 Pac. Rep. 674.

[5] United States *v.* Moline (U. S. D. C.), 82 Fed. Rep. 592.

[6] Adams *v.* Ulmer (Me.), 39 Atl. Rep. 347 [1897].

[7] City of Chicago *v.* Law (Ill. Sup.), 33 N. E. Rep. 855.

[8] Spokane Mill Co. *v.* Post (C. C.), 50 Fed. Rep. 429; Whisler *v.* Wilkinson, 22 Wis. 527 [1868].

gable water for the purpose of floating logs, etc., down the stream is a public use within the fair meaning of the constitution, and will justify the exercise of a right of eminent domain, and open it as a highway.[1]

To make waters navigable in a legal sense, the commerce which is carried on over them must be of an essentially valuable character. Such commerce need not be carried on by means of boats and vessels. Waters which are capable only of floating rafts and logs are public highways for that purpose.[2]

In Alabama a stream which is suitable for purposes of navigation only at certain periods of varying duration, and is not connected with tide-water, and will float logs and flat-boats only during the winter seasons, is not necessarily a public highway. The question as to whether such a stream is a public highway is one of fact for a jury.[3]

In order to be a navigable stream it is not necessary that the waters shall be deep enough to admit the passage of boats at all portions of the stream.[4] *

A non-navigable river may be used by the public for the purpose of floating logs if the stream be sufficient for that purpose in its natural condition, unaided by artificial means.[5] The fact that logs have been driven down a stream by the use of dams does not make it a navigable stream if they cannot be run down in ordinary weather.[6] Streams in which logs cannot be floated without being propelled by persons on the banks are not navigable.[7] The contrary rule prevails in Wisconsin.

In some decisions the right to float logs in a private stream has been held to be confined to those logs cut near the streams.[8]

The right of floatage of logs has been held not of such importance as to sacrifice the use of water for machinery to the former use.[9] At those times when a stream is not naturally floatable an upper riparian owner has no right to detain the water until a flood can be caused sufficient to float logs to the detriment of the lower riparian owner.[10]

It is held that the waters of a stream need not be fit for navigation at all times, but that their capacity therefor should recur with regularity.[11] The

[1] *In re* Burns, 155 N. Y. 23, *reversing* 16 App. Div. 507.

[2] 16 Amer. & Eng. Ency. Law 242, *many cases cited;* Collins *v.* Howard (N. H.), 18 Atl. Rep. 794. This rule is somewhat qualified in South Carolina. *See* Cates *v.* Wadlington (S. C.), 1 McCord 582; Amer. R. W. Co. *v.* Amsden, 6 Cal. 443.

[3] Olive *v.* State (Ala.), 5 So. Rep. 653 [1889].

[4] St. Anthony W.-p. Co. *v.* Board of Commrs., 158 U. S. 349.

[5] DeCamp *v.* Thompson (Sup.), 44 N. Y. Supp. 1014; Collins *v.* Howard (N. H.), 18 Atl. Rep. 794.

[6] Smith *v.* Carlow (Mich.), 72 N. W. Rep. 22. *But see* Whisler *v.* Wilkinson, 22 Wis. 572 [1868].

[7] Brown *v.* Chadbourne, 31 Me. 9; Morgan *v.* King, 35 N. Y. 454.

[8] Kupman *v.* Blodgett (Mich.), 14 N. W. Rep. 109. *See* Smith *v.* Fonds, 64 Miss. 551; Morgan *v.* King, 35 N. Y. 454.

[9] Middleton *v.* Flat River B. Co., 27 Mich. 533. *But see* Collins *v.* Howard (N. H.), 18 Atl. Rep. 794.

[10] Thunder Bay B. Co. *v.* Speechly, 31 Mich. 336; Witheral *v.* Muskegon B. Co., 68 Mich. 48.

[11] 16 Amer. & Eng. Ency. Law 243, 244; Swan *v.* Munch (Minn.), 67 N. W. Rep. 1022.

* *See* Sec. 234, *supra.*

decisions are not agreed as to the rights of the public to use streams which are capable of floating logs for but a part of the year. In those states where the lumber industry is important such streams are held to be subject to the public use during times when they have sufficient capacity. This is true in the states of Maine, Michigan, Mississippi, Oregon, and Wisconsin. In other states the rule is laid down that small streams capable only of floating logs during a freshet or for a small part of the year are not subject to a public easement of floatage. This was so held in the states of Alabama, Illinois, Massachusetts, and New York.[1] When there was no evidence concerning the character of the forests adjacent, or the number of people engaged in the logging business, or that boats had ever navigated its waters, or that it was exempt from the government survey as a public stream, it was held that the stream, as a matter of law, was not a public stream.[2]

In some states laws have been enacted requiring that logs shall not be floated down certain rivers unless bound together in rafts or inclosed in boats, and providing for the forfeiture of all logs floated in violation of such statutes. Such a law has been held to be constitutional.[3] The law has been held constitutional though the logs came from one state and passed through into another.[4]

The title of the owner, it seems, cannot be divested for the violation of such a statute unless he had notice and an opportunity to show his innocence of the violation of the law.[5] Timber was held not liable to forfeiture after it had come into the custody and control of the owner.[6]

It has been held not a crime to float rafts, logs, timber, boats, and vessels loose and adrift in and upon the navigable waters of the United States. The law making it a crime to obstruct navigation applies only to those obstructions which are permanent in their nature.[7]

One driving logs in a navigable stream is liable only for injury to the estates of riparian owners resulting from a lack of ordinary care, and it is therefore improper to charge that one is liable for such injury if it might have been foreseen by an ordinarily prudent man.[8]

When a person has by proper proceedings acquired a right to maintain a dam in a stream navigable for logging purposes, and by accident there is a recent break in the dam, he is entitled to a reasonable time in which to repair the dam, and to the reasonable detention of the logs of a navigator for its protection.[9] The right to float logs in a stream may be acquired by adverse

[1] *But see* Brown *v.* Schofield, 8 Barb. (N. Y.), 243; Meyer *v.* Phillips *et al.*, 97 N. Y. 485 [1884]; Haines *v.* Welch, 14 Ore. 319; Haines *v.* Hall, 17 Ore. 165.

[2] Bayzer *v.* McMillan Mill Co. (Ala.), 16 So. Rep. 923.

[3] Craig *v.* Kline, 65 Pa. St. 399; Scott *v.* Wilson, 3 N. H. 321. *See* United States *v.* Burns (C. C.), 54 Fed. Rep. 351.

[4] Harrigan *v.* Conn. R. L. Co., 129 Mass. 580.

[5] Craig *v.* Kline, 65 Pa. St. 399; Wendt *v.* Craig, 67 Pa. St. 424.

[6] Baron *v.* Davis, 4 N. H. 338.

[7] United States *v.* Burns (C. C.), 54 Fed. Rep. 351.

[8] Coyne *v.* Mississippi & R. R. Boom Co., 75 N. W. Rep. 748.

[9] Pratt *v.* Brown (Mich.), 64 N. W. Rep. 583.

use for the full prescriptive period, especially where the parties have gone upon the servient lands and built dams and overflowed them.[1]

244. Banks and Shores of Navigable Waters and their Use.—Under the civil law the public was entitled to the use of the banks and shores of navigable waters as appurtenant to the right of passage, and the same law holds in states where the principles of that system of law prevail. This is true in Louisiana. Under the common law it is pretty well settled that the rights of navigators are limited to the shore below high-water mark, and that the easement of passage does not include the use of the banks and shores for general purposes incident to navigation.[2] It has been held that the public have no general rights as against riparian owners to land, embark, load, or unload freight. It has even been held in some cases that a part of the highway could not be used for such purposes, but there are numerous cases in which it has been held that a ferry might be landed at a highway and the same be used for a landing.[3] It has been held that the public cannot acquire a right to the landing by custom or prescription in New York, Indiana, and Wisconsin. A different rule has been established in Massachusetts, North Carolina, Pennsylvania, and Maine. The legislature may, of course, take private property for the use of a landing, but it seems the selectmen of the town cannot do so unless expressly authorized by their charter.[4] As against all except riparian owners the public have a right to moor or anchor on the banks or shores of navigable waters.

There is no public right at common law to tow from the banks, nor has the public a right of access to waters from inlying lands. The owners of stranded property may go upon the banks for the purpose of reclaiming what belongs to them. Persons floating logs down a stream may go upon the banks in cases of necessity.[5] A builder of vessels moored opposite the lands of a riparian owner for the purpose of repairs or for placing therein engine, boilers, and machinery has no right to carry lines from them across the river-bank of such owner against his objection, and fasten them upon the latter's land.[6] If he does so against the owner's objection, and fastens them upon the land of such builder, and insists upon the right to continue such acts, the riparian owner may be entitled to an injunction although his land is unimproved and such acts produce no actual present damage.[6]

Among the rights of the public in a navigable stream is that of mooring vessels for the purpose of repairs, and of putting in engine, boilers, and machinery after such vessels have been launched. Such use, reasonably enjoyed, is not a trespass upon the lands of a riparian owner in front of

[1] Swan *v.* Munch (Minn.), 67 N. W. Rep. 1022; Ramgren *v.* McDermott (Minn.), 76 N. W. Rep. 47. *But see* Meyer *v.* Phillips *et al.*, 97 N. Y. 485 [1884], *and* Commrs *v.* Catawba Lumb. Co. (N. C.), 20 S. E. Rep. 707.

[2] 16 Amer. & Eng. Ency. Law 261.

[3] 16 Amer. & Eng. Ency. Law 262. *And see* Murphy *v.* Bullock (R. I.), 37 Atl. Rep. 348.

[4] 16 Amer. & Eng. Ency. Law 262.

[5] 16 Amer. & Eng. Ency. Law 263.

[6] Pollock *v.* Cleveland Shipbldg. Co. (Ohio), 47 N. E. Rep. 582 [1897].

whose river-bank, outside of the dock-line, such vessels are moored, and such owner will not be entitled to an injunction forbidding such use unless special injury to his property is shown.[1]

245. Rules and Restrictions Governing the Use of Navigable Waters.— The use by the public of navigable waters is subject to rules and restrictions not unlike those which apply to highways in general. The right must be exercised in a reasonable way and with due regard to the rights of riparian owners and other navigators. What is a reasonable use is a question of fact and may be determined by the circumstances of each case. The subject of navigation is too large for even a brief treatment in this book, and the reader is referred to other works upon the subject.

The public right of navigation may be restricted or even extinguished by natural causes or by legislative enactment. There are decisions to the contrary in those states where the ordinance of 1787 was in force. It has been held that highways by water could not be entirely destroyed.[2]

The right to improve navigable waters is subject to government regulation and control. In England it is vested in Parliament, and in the United States the authority of Congress, under the commercial clause of the constitution, has been held to be paramount. In the absence of congressional action the power of the state legislature is held to be supreme. It may direct the improvement of navigable rivers, or may authorize improvements by individuals or private corporations, and may levy tolls to reimburse the state for the improvement. The state legislature may authorize the improvement of a river within its own borders, and impose reasonable tolls to compensate it for such improvement.[3]

A property owner affected by an improvement in a navigable stream, as the widening of a navigable river of the United States by a city, may object on the ground of the city's want of power, although the United States makes no complaint.[4]

[1] Pollock *v.* Cleveland Shipbuilding Co., *supra*.

[2] 16 Amer. & Eng. Ency. Law 264.

[3] Thames Bank *v.* Lovell, 18 Conn. 500; Palmer *v.* Cuyahoga Co., 3 McLean (U. S.) 226; Huse *v.* Glover, 19 U. S. 543; Benjamin *v.* Manistee R. Imp. Co., 42 Mich. 628; Sands *v.* Manistee River Imp. Co., 123 U. S. 288; Monongahela Nav. Co. *v.* United States, 13 Sup. Ct. Rep. 622.

[4] City of Chicago *v.* Law (Ill. Sup.), 33 N. E. Rep. 855.

CHAPTER XIV.

SUBTERRANEAN OR UNDERGROUND WATERS.

251. Subterranean Waters Defined.—Subterranean waters are of two kinds: first, waters that percolate or flow through the ground beneath the surface, and which have no well-defined channel that is known or ascertainable; secondly, underground currents of water that flow in defined and known channels. The law with regard to these two kinds of underground waters is quite different; the law of the one partaking of the character of the land, soil, and other characteristics of property, and the second being governed by the same laws that belong to watercourses.[1]

252. Percolating Waters.—The term "percolating waters," as applied to underground waters, means any flowage of subsurface waters other than those of a running stream, open, visible, and that may be clearly traced.[2] Such underground percolating waters are as much the property of the owner of the land as are ores, rocks, etc., beneath the surface.[3] The owner of the soil acquires all that lies beneath its surface, whether it is solid rock or porous ground or venous earth, or part soil and part water. The person who owns the fee-simple may take and apply all that is found therein for his own purpose at his own free will and pleasure. If, in the exercise of such rights, he interrupts so as to have the water collected in the underground springs in his neighbor's well, this inconvenience falls within the description of *damnum absque injuria* which cannot become a cause of action.[4] The only remedy which the owner of the well can adopt to prevent such water from being diverted from his well is to sink his well deeper.[5]

Percolating waters belong absolutely to the owner of the soil.[6] Such

[1] 27 Amer. & Eng. Ency. Law 423; Gould on Waters (2d ed.), § 280; cases cited in Public Documents, Report of Spec. Comm. U. S. Senate on the Irrigation and Reclamation of Arid Lands (Irrigation in the U. S., by R. J. Hinton, p. 355).

[2] Mosier *v.* Caldwell, 7 Nev. 363.

[3] 27 Amer. & Eng. Ency. Law 427; Reid *v.* Reid (Cal.), 44 Pac. Rep. 564; Cross *v.* Kitts (Cal.), 22 The Reptr. 361 [1886]; cases cited in Report of Sp. Comm. U. S. Senate on Irrigation and Reclamation of Lands, vol. 4, p. 348 [1890].

[4] Ashton *v.* Blundell, 12 M. & W. 324; Trustees of Delhi *v.* Youmans, 50 Barb. 316 [1867].

[5] News River Co. *v.* Johnson, 2 El. & El. 445; Com. *v.* Fisher (Pa.), 1 P. & W. 462. *But see* Forbell *v.* City of New York, 56 N. Y. Supp. 790 [1899].

[6] Gould *v.* Eaton (Cal.), 44 Pac. Rep. 319; 27 Amer. & Eng. Ency. Law 425, *many cases cited;* Brown *v.* Kistler (Pa.), 42 Atl. Rep. 885.

waters are regarded as part of the earth, with the absolute right of use and appropriation by the owner of the land in which it is.[1] It is well settled by authority that the owner of land may intercept or impede the natural underground percolations of his land even though it destroy the sources of supply of his neighbors' springs or wells. The owner of land may dig wells or drainages upon his land, conduct mining operations, or in any way change its natural condition even though it destroy the percolating waters of other adjacent owners.[2]

The reasoning is briefly this: In the absence of express contract and of positive authorized legislation as between proprietors of adjoining lands, the law recognizes no correlative right in respect to underground waters percolating, oozing, or filtering through the earth, and this mainly from considerations of public policy, viz.: (1) because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movement, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and therefore would be practically impossible; (2) because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

253. Percolating Waters Distinguished from Surface Currents.—The rights of adjoining proprietors in running streams, and the general laws relative thereto, have no application to undefined subterranean waters which are the result of natural and ordinary percolations through the soil. As Justice Tindall has said in an English case:[3] "There is a marked and substantial difference between watercourses flowing on the surface, and springs beneath the surface of the ground. In the case of a well sunk by a proprietor in his own land, the water which feeds it from the neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath the surface. No man can tell what changes these underground sources have undergone in the progress of time. No proprietor knows what part of the water is taken from beneath his own soil, how much he gives originally, or how much he transmits only, or how much he receives. On the contrary, until the well is sunk and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow at all. The difference in the two cases with respect to the consequences, if the same law be applied to both, is apparent to any one. In the case of a running stream, the owner of the soil merely transmits the water over its surface; he receives as much from the higher neighbor as he sends down to

[1] Wheelock *v.* Jacobs (Vt.), 40 Atl. Rep. 41 [1897]; Trustees of Delhi *v.* Youmans, 50 Barb. 316 [1867].

[2] 27 Amer. & Eng. Ency. Law 425; Trustees *v.* Youmans, 50 Barb. 316 [1867]; Bloodgood *v.* Ayers, 108 N. Y. 400 [1888].

[3] Acton *v.* Blundell, 12 M. & W. 324.

his neighbor below; he is neither better nor worse; the level of the water remains the same. If the man who sinks the well on his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the springs in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is found and through which it is transmitted from draining his land for the proper cultivation of the soil, and thus by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense if the latter has erected machinery for the purpose of mining and discovers when too late that the appropriation of the water has already been made. Further, the advantage on one side and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage or the drinking-place of cattle, while the owner of the adjoining land may be prevented from mining metals and minerals of inestimable value; and lastly, there is no limit of space in which the claim of right to an underground spring may be confined. In the present case the nearest coal-pit is at a distance of half a mile from the well, and it is obvious that the law must equally apply if there is an interval of many miles."

In an American case[1] Justice Strong observes: "A surface stream cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly have rights in another's lands which are imperceptible, of which neither himself nor the other can have any knowledge. No such rights can be supposed to be taken into consideration when either the upper or lower tract was purchased. The purchaser of lands on which there are unknown subsurface currents must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of land on which a spring rises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land. It would seem, therefore, most unreasonable that the latter should have a right to prevent his neighbor from enjoying his own land in the ordinary way, either by digging wells, cellars, drains, or by quarrying and mining. A further reason for holding that there is no such right is found in the indefinite nature and great extent of the obligation which would be imposed if the right existed. Instances have occurred where excavations have had the effect of draining land, although at the distance of several miles.[2] Even in the case before us, the mining-pit of the defendants is more than three hundred feet distant from the plaintiff's spring. These appear to us very sufficient reasons for distinguishing between surface and subterranean streams, and denying to

[1] Haldeman *v.* Bruckhart, 45 Pa. St. 514.

[2] Gale & Wheatley on Easements 178.

inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjoiners' land. They are as applicable to unknown subsurface streams as they are to filtrations and percolations through small interstices. Neither can be defined watercourses, though they may be definable."[1]

254. Sapping and Diverting Sources of Springs and Wells.—The owner of land may lawfully drain the natural percolations from his neighbor's land, and he may prevent the percolations of his own land going into the well of his neighbor.[2] Therefore where a spring was fed solely from percolating waters from a swamp or wet lands surrounding the same and not by a running stream, and one party had collected the water of the spring into a reservoir and transmitted it by pipes for years, it was held that he has no action against another who had diverted the water from the land by means of a tunnel and ditch constructed above the reservoir on his own lands.[3]

As between two corporations pumping water from their respective premises for transportation and sale, one cannot complain of the diversion of percolating water from his own land by the other. Their rights in this respect are equal.[4]

However, the right of an owner of land to divert or consume percolating waters has been held not to extend to authorize the destruction of a stream, spring, or well by cutting off its source of supply, when the acts causing such result are not done for the beneficial use and enjoyment for any purpose of the land itself whereon they are done, but for the sole purpose of gathering water, by pumps as well as by natural means, to be carried to a distant place for the use of strangers having no right to the water as against the owners of neighboring lands.[5]

A spring from which no stream or watercourse runs, but the source of which and the flow of its waste are alike underground, and so matters of speculation and uncertainty, belongs to the owner of the land, and he may divert and use the waters to his own uses.[6] In this case the water came from a spring situated on defendant's land, one hundred and twenty feet from plaintiff's line, and had for many years been conducted to a trough. The waste water from the trough disappeared into the ground one hundred feet distant, near plaintiff's line, appeared on the surface, sometimes appeared to be in motion toward a sluice, under a fence dividing defendant's land from plaintiff's, where it again disappeared, and came up again to the surface, twenty feet on plaintiff's side of the line, forming a spring or reservoir.

[1] Case *v.* Hoffman (Wis.), 72 N. W. Rep. 390 [1897].

[2] New River Co. *v.* Johnson, 2 El. & El. 435; Acton *v.* Blundell, 12 M. & W. 327. *See also* Hodgkinson *v.* Ennor, 4 B. & S. 241. Bloodgood *v.* Ayers, 108 N. Y. 400 [1888]; Wilson *v.* Ward (Colo.), 56 Pac. Rep. 573 [1899].

[3] So. Pac. Railroad Co. *v.* Dufour, 95 Cal. 615; Leonard *v.* Shatzer (Mont.), 28 Pac. Rep. 457.

[4] Merrick Water Co. *v.* City of Brooklyn (Sup.), 53 N. Y. Supp. 10 [1898]; *see* Smith *v.* Brooklyn, 18 App. Div. 340.

[5] Smith *v.* Brooklyn (Sup.), 46 N. Y. Supp. 141.

[6] Bloodgood *v.* Ayers, 108 N. Y. 400 [1888].

Percolating water collected or gathered into a stream in a defined channel by the owner of the land is subject to the same rights of ownership and use as are ordinary waterways.[1]

255. Springs and Wells Drained by Construction of Public Works.—If, in the appropriation and use of land taken for public purposes, subterranean waters are intercepted or diverted, no action can be had for damages.[2] A city is not liable because, in the construction of a sewer, the water which formerly percolated to a spring or well is drained.[3] It was so held when the construction of a water-tunnel rendered a well dry.[4] If a railroad company in the construction of its road renders a well or subterranean stream dry by excavation of the ground, the party owning the well or stream can have no right of action against the company.[5]

It is sometimes held that a railroad or canal company acquires only a right of way or mere *usufruct* in the land, and, not being the actual owner, that it therefore cannot have the rights of an owner in the land, and cannot therefore exercise the privileges to the injury of adjoining owners.[6] It may well be doubted if the ownership of a mere right of way is sufficient ownership of land to entitle a railroad company to appropriate the waters under the surface of the right of way. In a Massachusetts case[7] it was held that the railroad company acquired only a special right to the use of the land upon the express condition that it should pay all damages which might be occasioned to others.

Sometimes it is expressly provided by statute that charter companies should be liable for consequential damages.[8] The doctrine that the draining and destruction of a well by an adjoining owner of land exercising his right to dig therein is *damnum absque injuria* where the well is not supplied by a distinct vein of water, has no application where such draining and destruction are caused by the construction of a tunnel for the water-supply of a city, under authority of an act of Congress, over land in which a right of way only is acquired, and the act provides a remedy for such an injury.[9] When a statute makes a town liable for "damages occasioned by laying out, making, or maintaining" a sewer, and another statute which applies to sewers provides that, in estimating the damage, "regard shall be had to all the damages done to the party whether by taking his property or injuring it in any manner," a town which lawfully takes land and constructs a common sewer therein, whereby a well upon land not taken, or adjoining land taken, is

[1] Cross. *v* Kitts (Cal.), 22 The Reptr. 361 [1886].

[2] Reg. *v.* Metropolitan Bd. Wks., 3 B. & S. 710.

[3] Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274.

[4] Alexander *v.* United States, 25 Ct. of Cl. 87.

[5] New Albany, etc., R. Co. *v.* Peterson, 14 Ind. 112.

[6] *See cases cited supra and* Hart *v.* Jamaica Pond Aq. Co., 133 Mass. 488.

[7] Parker *v.* Boston R. Co., 3 Cush. 114.

[8] Parker *v.* Boston, etc., Railroad Co., *supra;* Trowbridge *v.* Brookline, 144 Mass. 139; Aldridge *v.* Cheshire Railroad Co., 21 N. H. 359.

[9] United States *v.* Alexander, 13 Sup. Ct. Rep. 529, 532; Manufacturing Co. *v.* Atty. Genl., 124 U. S. 581, 8 Sup. Ct. Rep. 631.

made dry, the well being fed by water percolating through the soil, is liable to pay damages therefor to the owners of the land in which the well is situated.[1]

An Iowa case held that where a railroad company acquired the right of way over and through land for all purposes connected with the use, construction, and occupation of its railroad, it had the legal right to dig a well upon such right of way and to use the water supplied by percolation for railroad purposes, although it did materially diminish a grantor's spring.[2]

A city is not liable to an abutting lot-owner for damages where, by building a sewer in the street or making any other legitimate use thereof, it drains a spring on his lot by cutting off the water which for twenty-one years has supplied it by percolation through the soil of the street, since the owner of land cannot by prescription acquire any right to percolating water.[3]

A city was held liable for damages caused by lowering the level of underground waters under another's land by the operation of a pumping station connected with its water-works.[4]

256. Subsurface Currents Known and Defined.—If subsurface currents or percolations flow in defined and known channels, then they are governed by the laws and principles which apply to watercourses. The word "*defined*" as used in this description means a constricted and bounded channel, though its course may be undefined by human knowledge, and "*known*" refers to knowledge by reasonable inferences.[5] If, in order to determine the existence of subterranean channels, it is necessary to resort to excavations, then it is not considered as "known" within the meaning of the law.[6] Methods frequently resorted to to determine if the underground waters have a well-defined and known course is by the introduction of some highly colored or strongly smelling material at the source, and detecting by the sense of sight or smell the presence of it at some point lower down and supposed to be on the watercourse. The mere fact that the quantity of water at a place has been diminished in proportion to that at the source may be some evidence that both are upon the same subsurface current; but when water from a spring disappears upon a person's land, and it is desired to prove that the waters of this spring form part of a stream, it is not sufficient to show that, since the diversion of the waters of the spring, the waters in the stream and in the wells of people near it have perceptibly diminished. Especially is this not conclusive evidence that they have a common source when the defendant or owner of the land upon which the spring is diverted showed that there has been less rainfall, that the timber about certain other springs from which

[1] Trowbridge *v.* Town of Brookline (Mass.), 10 N. E. Rep. 796 [1887].
[2] Hougan *v.* Milwaukee, etc., R. Co., 35 Ia. 558.
[3] Elster *v.* Springfield (Ohio Sup.), 30 N. E. Rep. 274.
[4] Forbell *v.* City of New York, 56 N. Y. Supp. 790 [1899]; Smith *v.* Brooklyn, 18 App. Div. 340.
[5] Gould on Waters (2d ed.) 81.
[6] Ewart *v.* Belfast P. L. Guard., 9 L. R. Ir. 172.

water flowed into the stream had been cut, that more land had been plowed and more stock kept along the stream, and that in a cañyon located near the point where the water from the spring disappeared water flowed only for a few days during a season of heavy rain; and in addition thereto expert geologists testified that the formation in the vicinity of the spring was such as to exclude any probability that the waters thereof, after disappearing in the ground, reappeared to form part of said stream.[1]

257. Presumption that Waters are Percolating.—If it does not appear that the waters which came to the surface are supplied by a defined and known flowing stream, it will be presumed to be formed by the ordinary percolations of water in the soil, and therefore subject to no legitimate purpose of the owner of the soil, even though, as a result thereof, they are polluted, diminished, or diverted from land to which they would otherwise naturally have passed.[2] The onus of proof lies, therefore, upon the plaintiff claiming that the waters flow in a well-defined and known channel, and it requires him to show that the stream when it emerges into light comes from, and has flown through, a well-defined subterranean channel, and to show this without opening the ground by excavation or having recourse to abstruse speculations of scientific persons. It should be ascertainable by men of ordinary powers and attainments exercising reasonable diligence.[3] When there is a controversy respecting the use of the waters of a channel, and in the absence of anything to show that it is defined by any flowing water, it will be presumed to be formed from the ordinary percolations of water and of the soil.[4]

Where the waters of a stream gradually disappear and percolate through the sand, within limits not at all defined, except by the valley in which the stream is located, over an impervious substratum, thus finding their way to a lake, a riparian owner on an outlet to the lake has no right to have such underground flow protected.[5] A mere rivulet, in regard to the right of the owner to complain of its diversion by the owner of adjacent land, is to be classed, not with running streams, but with percolating water.[6]

258. Appropriation and Use of Subterranean Currents.—When it is determined that water flows in a defined subterranean stream, no one of several persons whose wells tap the same channel can make an artificial use of the water so as entirely to deprive the others of it.[7] When such waters are used for water-supply by a city, and it is also used by an individual for the

[1] Farwell *v.* Sturgiss W. Co. (S. D.), 73 N. W. Rep. 916 [1898].

[2] Hanson *v.* McCue, 42 Cal. 303; Tampa W.-w. Co. *v.* Cline (Fla.), 20 So. Rep. 780; *semble* Meyer *v.* Tacoma Lt. & W. Co. (Wash.), 35 Pac. Rep. 601.

[3] Black *v.* Ballymera Commrs., L. R. 17 Ir. 474.

[4] Hanson *v.* McCue, 42 Cal. 303. *And see* Ocean Grove C. M. Assn. *v.* Asbury Pk. Comrs., 40 N. J. Eq. 447; Meyer *v.* Tacoma Co. (Wash.), 35 Pac. Rep. 601.

[5] Meyer *v.* Tacoma Light & Water Co. (Wash.), 35 Pac. Rep. 601.

[6] Merrick Water Co. *v.* City of Brooklyn (Sup.), 53 N. Y. Supp. 10 [1898].

[7] Willis *v.* Perry (Ia.), 60 N. W. Rep. 727.

operation of public bath-houses, the latter use is an artificial use of such waters.[1] The owner of land over a subterranean stream may excavate the soil so as to render the water available for his use, if by doing so he does not pollute the water or diminish its flow perceptibly or divert it from its natural course.[2]

259. Underground Currents Compared with Watercourses.—The same general principles of the law which apply to watercourses and streams at the surface of the earth will apply to well-defined and known subterranean streams. No distinction exists between surface and subterranean streams. If the latter are well defined and constitute a regular stream, one cannot divert them or interfere with the rights of the owner below him.[3] If a subterranean stream emerges and afterwards sinks and re-emerges, and if it has an exact course that can be traced, the lower riparian owner will be protected against diversion or pollution of the water.[4] If the course be well known, as is often the case where it sinks underground for a short distance and then emerges again, it cannot be contended that the owner of the soil in which the stream flows cannot maintain an action for the diversion of it.[5]

In limestone countries streams of great volume and power flow through subterranean courses for great distances and then emerge from their caverns, furnishing power for machinery of every description, and supply towns and dwellings with water, for domestic and sanitary purposes. To permit these streams to be obstructed or diverted merely because they run through subterranean channels would be to forfeit the rights of mankind in relation to flowing water.[6] The growth of certain shrubs and bushes which grow nowhere except where there is water has been held to mark a well-defined channel of a subterranean stream.[7] To constitute a well-defined and regular underground stream it is not necessary that the flow should be continuous. It should, however, be well known.[8] The fact that water fails to flow to a spring when the water was drained from a natural opening on higher ground is not of itself sufficient to show that the water flowed in a well-defined channel.[9]

260. Grants of a Right to Underground Waters.—When the owner of land has sold or granted to another certain rights in a water-supply, he may not destroy that water-supply without making himself liable for the interference therewith. If a grant of water, either express or implied, has been made to secure to the grantee a regular supply of water, the grantor will be liable if by any interference either of well-known watercourses or by under-

[1] Willis *v.* Perry (Ia.), 60 N. W. Rep. 727.
[2] Tampa W.-w. Co. *v.* Cline (Fla.), 20 So. Rep. 780.
[3] 27 Amer. & Eng. Ency. Law 424.
[4] Saddler *v.* Lee, 66 Ga. 45; Whetstone *v.* Bowser, 29 Pa. St. 60.
[5] Dickinson *v.* Grand J. Canal Co., 7 Exch. 282.
[6] Wheatley *v.* Baugh, 25 Pa. St. 528.
[7] Hale *v.* McLea, 52 Cal. 581.
[8] Chase *v.* Silverstone, 62 Me. 175; Shively *v.* Hume, 10 Ore. 76; Ewart *v.* Belfast P. L. Guard., L. R. 9 Ir. 172. *See* Meyer *v.* Tacoma Lt. & W. Co. (Wash.), 35 Pac. Rep. 601.
[9] Taylor *v.* Welch, 6 Ore. 200.

ground operations he diminishes such supply of water. A landowner who has granted to a cheese-factory situated on his land the use of water conducted to the factory from springs on the owner's land, and who has undertaken to warrant and defend the granted premises against himself and all other persons, will be held liable for withdrawing the supply from such springs.[1]

The grantee is not bound to maintain the spring in the exact spot in which it first existed; and if the water was supplied to grantor from another spot, it could not be said that the grantee had destroyed the spring in the sense of the contract and in violation of it, as when the source has been sapped by quarrying stone.[2]

A grant, however, of a right simply to dig and stone up a certain spring, and to conduct the water through the grantor's land, with a covenant of warranty, was held not to preclude the grantor from sinking another spring on his land, although the effect of it was to render the spring granted useless, provided such act was not done maliciously. In this case the parties were considered in the same light as adjacent owners, and the law applicable to adjoining owners was applied, which permits the neighbor to dig on his own land, though the effect might be to cut off the water from the plaintiff's spring by percolation. The grant was merely to the right of the spring, and did not secure to him any greater rights than such as he would have had if he had owned the land on which it was situated.[3] In another case, where a man owned two adjoining farms, upon one of which there was a spring from which pipes had been laid conducting the water to the barnyard of another farmer, thus furnishing water for his stock and other domestic purposes, and the common owner of the two farms sold and conveyed the former, so supplied with water, by a deed conveying the land with appurtenances, but made no mention of a spring or pipes, it was held that when the former owner dug a well upon his farm a few feet from the spring, which resulted in lowering the water of the spring below the mouth of the pipes so as to deprive the purchaser of the use of the water, he might restrain the vendor from the use of the well causing the injury.[4]

261. Rights to Waters of Springs and Wells as between Grantor and Grantee.—If the grant be merely of the land so as to make the grantee the owner thereof, he has not any better rights than if he had been the original proprietor of the soil, and his neighbor, even though he may be the grantor, may drain the lands as he sees fit, although such act interfere with the grantee's water-supply.[5]

A grant of certain springs or a fountain of water has been held not to

[1] Johnston Cheese Mfg. Co. *v.* Veghte, 69 N. Y. 16; Chamberlain *v.* B. & O. R. Co. (Md.), 8 Atl. Rep. 267 [1887].

[2] Chamberlain *v.* B. & O. R. Co. (Md.), 8 Atl. Rep. 267 [1887].

[3] Bliss *v.* Greeley, 45 N. Y. 671.

[4] Paine *v.* Chandler, 134 N. Y. 385. *But see* Davis *v.* Spalding (Mass.), 32 N. E. Rep. 650.

[5] Chessley *v.* King, 74 Me. 164; Davis *v.* Spalding, 157 Mass. 431; Bliss *v.* Greeley, 45 N. Y. 671; Brain *v.* Marfell, 41 L. T. N. S. 455; McNab *v.* Robertson (Eng.), App. Cas. 129 [1896].

prevent the owner from properly draining his land to make it productive, even though by some unknown means the drainage of the land affects the water-supply.[1] The grant of an easement to draw water from a well by a pipe laid in the ground does not preclude the grantor or a subsequent purchaser from digging another well or reservoir on his land, even though it destroy the form of the easement by diverting the waters which formerly percolated into the well.[2] The purchaser of land subject to the reservation that B. should have the right to conduct water from certain springs thereon to adjoining lands does not prevent the owner of the land on which the spring is located from excavating so as to cut off the supply of water.[3]

One who purchases a well and the right to convey water from it acquires merely a right to water rising in the well, and has no cause of action against one who intercepts the water before it reaches the well.[4] The grant of a well has been held to pass the fee of the land occupied by the well.[5] The grant of a privilege of taking water from springs gives the owner a right to take the water that issues from the ground by natural forces. It does not include wells from which the water does not flow to the surface.[6]

262. Prescriptive Rights in Underground Waters.—The use of underground percolating waters for a great length of time does not give to the person utilizing such waters a prescriptive right to receive such percolations through the land of another.[7] Each owner of land has an equal and complete right to the use of his land and to the water which is in it. Water combined with earth or passing through it by percolation or filtration has no distinctive character of ownership from the earth itself, not more than the metallic oxides of which the earth is composed. A man may not know that his neighbor's well is supplied by water percolating from his own soil, and he should not, therefore, be held to have lost his rights by permitting such continued use of the water. He cannot know that his neighbor's well requires any other than the natural and common use of the water under the surface, nor does he know whence the water comes, nor by what means it appears in one place or the other, or which of the persons who afterwards opened the earth encroaches upon the rights of the other.[8] No prescriptive right can arise against any party unless the privilege exercised interferes in some way with the rights of the party against whom the grant is presumed. In the case of a watercourse the right of the riparian owner is not from the presumed grant, but is a right incident to the property itself.

[1] Buffum *v.* Harris, 5 R. I. 243.

[2] Davis *v.* Spalding, 157 Mass. 431; So. Pac. R. Co. *v.* Dufour (Cal.), 30 Pac. Rep. 783.

[3] Lybe's Appeal, 106 Pa. St. 626.

[4] Brain *v.* Marfell, 41 L. T. N. S. 455. *And see* Huston *v.* Leach, 53 Cal. 262.

[5] Johnson *v.* Rayner (Mass.), 6 Gray 107.

[6] Mixer *v.* Reed, 25 Vt. 254; Clark *v.* Conroe, 38 Vt. 469.

[7] Elster *v.* Springfield, 49 Ohio St. 82; Dickinson *v.* Gd. Jc. Canal Co., L. R. 7 Exch. 282; Wheelock *v.* Jacobs (Vt.), 40 Atl. Rep. 41 [1897].

[8] Roath *v.* Driscoll, 20 Conn. 533; Frazier *v.* Brown, 12 Ohio St. 294; Trustees of Delhi *v.* Youmans, 50 Barb. (N. Y.) 316; Cross *v.* Kitts (Cal.), 22 The Reptr. 361 [1886].

263. Pollution of Underground Waters.—Although a person may exercise his right to take from his neighbor, percolating underground waters to the latter's injury and loss, yet he may not poison, pollute, or contaminate the percolating waters of his own land which percolate from his soil into that of the adjoining landowner. If he permit the seepage of poisoned and polluted waters from his land into that of his neighbor to the injury of the latter, he will be liable for the damages suffered.[1] Any person who collects or negligently allows deleterious or dangerous substances to remain upon his land, whereby the usefulness and enjoyment of his neighbor's land is destroyed, will be held liable for the injury resulting. If the neighbor's useful waters be corrupted either by the ordinary or extraordinary, yet not very uncommon, action of the elements, he will be liable.[2] He must keep such filth and dangerous substances upon his own premises at his peril.[3]

264. Pollution by Oil, Tar, etc., Soaking into Ground.—One who stores oil upon his premises will be liable if he allow it to leak from the cask or tank in which it is stored and pass into the ground and pollute the stream from which the plaintiff's spring is supplied; and this was held to be true even though the defendants were ignorant that the oil was affecting the stream.[4] In this case the court said: "An owner has the right to take and appropriate underground water, and thus prevent its use by another, and yet he has no right to poison it, however innocently, or to contaminate it so that when it reaches his neighbor's land it is in such condition as to be unfit for use either by man or beast. The owner of land has the same right to the use and enjoyment of the water that is around and through his premises as he has to use and enjoy the water above ground. He is entitled to the use of what is above the ground as well as that below it, and it can scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor to the injury of himself or family. We see no reason why he should be permitted to contaminate the water that flows from his land to his neighbor, producing the same results, and so escape the liabilities of the damages sustained. Whether the water escapes one way or the other is immaterial."[5] Recovery has been allowed for the contamination of springs or wells by permitting gas to escape therein,[6] and by locating and maintaining a cemetery or private burial-ground.[7]

The fluids from gas-works, and the gas itself, when allowed to permeate

[1] 27 Amer. & Eng. Ency. Law 436, *and many cases cited.*

[2] Woodward *v.* Aborn, 35 Me. 271.

[3] Tenant *v.* Goldwin, 6 Wood 311.

[4] Kinnaird *v.* Standard Oil Co., 89 Ky. 469; Carhart *v.* Auburn G. L. Co. (N. Y.), 22 Barb. 297; Brown *v.* Illius, 27 Conn. 84; Millington *v.* Richards G. Co., 25 Gas J. 215.

[5] Prior, Justice, in Kinnaird *v.* Standard Oil Co., 89 Ky. 469.

[6] Sherman *v.* Fall River I. Wks. (Mass.), 5 Allen 213; Shuter *v.* The City, 3 Phila. (Pa) 228; Millington *v.* Richards, 23 Gas J. 215.

[7] 27 Amer. & Eng. Ency. Law 438, 8 *idem.* 1281; Pensacola Gas Co. *v.* Pebley (Fla.), 5 So. Rep. 593 [1889], *gas refuse.*

soil to the injury of wells and springs, polluting the waters, render the owners liable for the injury.[1]

The fact that other causes have contributed to render the water of the well impure and unfit does not prevent the recovery of damages due to the cause complained of.[2] When sickness was caused by a mixture of illuminating-gas and sewer-gas which had found its way into plaintiff's house through various drains and sewers, the gas company was held liable if the combined gases were carried to the house by the illuminating-gas, which had escaped by the company's negligence.[3]

265. Contamination that Amounts to a Nuisance.—The percolation and contamination is frequently required to be so serious as to constitute a nuisance, and the question whether it is a nuisance, and the damage therefrom substantial, is for the jury.[4] This is always so where the plaintiff has suffered no special damage. To establish the conducting of a lawful business a nuisance, it need not be shown that it was carried on recklessly or was improperly managed.[4]

266. Fouling or Contaminating the Land of Adjoining Owners.—The landowner is liable if he permits sewage from his house to flow into the well of a neighbor.[5] In this case the court said: "The right to foul water is not the same as the right to get it, and does not depend upon the same principles. *Prima facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbor's supply. In such a case the neighbor must submit to the inconvenience; but no man has a right to use his own land in such a way as to be a nuisance to his neighbor; and whether the nuisance is effected by sending filth into his neighbor's land, or whether the nuisance is effected by poisoning the air which his neighbor breathes or the water he drinks, is wholly immaterial. If a man choose to poison his own well, he must take care not to poison the waters which other persons have a right to use as much as himself. To hold to the contrary on the ground that the water is not the neighbor's property until he gets it, and that it is poisoned before he gets it, would be to take an inadequate view of the subject and to overlook the fact that the law of nuisances is not based exclusively upon rights of property."

The ground upon which the landowner who contaminates underground water is made liable is that his acts in polluting the water amount to a nuisance; and in some cases the true cause of action is not based upon con-

[1] Ottawa Gas Lt. Co. *v.* Graham, 28 Ill. 74; Pottstown Gas Co. *v.* Murphy, 39 Pa. St. 257; Columbus Gas Co. *v.* Freeland, 12 Ohio St. 392; 8 Amer. & Eng. Ency. Law 1281, *and cases cited.*

[2] Sherman *v.* Fall River Co. (Mass.), 5 Allen 213.

[3] Hunt *v.* Lowell Gas Co. (Mass.), 8 Allen 169.

[4] Gavigan *v.* Atlantic Refining Co. (Pa.), 40 Atl. Rep. 834 [1898].

[5] Ballard *v.* Tomlinson, 29 Ch. Div. 125.

tamination of underground percolating waters, but upon the negligence of the owner in allowing his impure sewage or polluted matter to escape from his premises to those of his neighbor, and the circumstance that it reached there by underground percolations, instead of by a surface stream or conveyance of the water, is quite immaterial. The mode of transmission is unimportant.[1]

267. Negligence an Element in Determining Liability for Fouling Subterranean Waters.—There are cases to the contrary in which courts have held that a person was not liable for the contamination of underground waters, but it cannot be denied that they are exceptions to the general rule.[2] While the law upon this question appears to be well settled that if a landowner permit a deleterious substance to escape into the ground to the injury of his neighbor's well or spring, he is liable therefor, yet it would appear to the author that there must be shown some element of negligence upon the part of the landowner in order to hold him for the damages suffered by his neighbor. It is hard to distinguish between a damage conveyed to one's neighbor by the medium of the water from an injury conveyed by the medium of air or other common phenomena of nature. If the landowner store casks of oil in his warehouse and by accident they spring leaks permeating the soil and contaminating the waters of his neighbor, it seems he is liable for the injury resulting therefrom.[3] No question of negligence seems to have been raised in the case. If, however, by accident the same casks of oil had taken fire and destroyed the neighbor's buildings, his liability for the injury suffered by his neighbor would depend upon whether he had exercised ordinary care and had not been negligent. To distinguish between the two cases, the ground of liability, it seems to the author, must be that of negligence, and if the owner of the oil that contaminated the spring had exercised due and proper care, it is doubtful if he could have been held liable for the damages to his neighbor.

The English and Massachusetts courts seem to require that negligence shall be shown. If the defendant has exercised due and proper care and is ignorant of the injury caused, it will defeat a right of action. So where the defendant had dug a well and drawn water from a river after it formed part of a stream, thus preventing the plaintiff from working his mill which was situated on the river, it was held that an action would lie. "But," said Justice Pollock, "if it appear that the company was ignorant and could not by any degree of care have ascertained before digging the well that it would have the effect of diverting the water, and when they discovered the effect of digging the well they could not have repaired the mischief, it might raise the question whether the cause was maintainable or not."[4]

[1] Ballard *v.* Tomlinson, 29 Ch. Div. 115. *And see note by* Hon. Edmond H. Bennett in 24 Amer. Law Reg. 634.

[2] *See* 27 Amer. & Eng. Ency. Law 437, *note.*

[3] Kinnaird *v.* Standard Oil Co., 89 Ky. 469.

[4] Dickinson *v.* Gd. Junc. C. Co., L. R. 7 Exch. 282.

The location and maintenance of cemeteries and burial-grounds are a frequent cause complained of by owners of wells and springs, and reasonably so. The use of such places of burial is not necessarily a nuisance, and it will usually be enjoined only upon clear proof of injury.[1]

One of the most frequent sources of contamination of waters is that by cesspools, sewage, and household wastes. If one suffer filthy water from a vault to percolate or filter through the soil to the injury of an adjoining owner's well and cellar, and it is done habitually and within the knowledge of the owner of the vault, whether it pass above ground or below, it is an actionable tort. The law requires under such circumstances that the owner shall exercise such reasonable precautions as effectually to exclude the filth from his neighbor's land, and not to do so is of itself negligence.[2] If the pollution had been the result of a sudden and unavoidable accident which could not have been foreseen, or guarded against by due care, doubtless the owner of the vault would not have been liable in damages, but the percolations appeared to have been constant and their existence to have been known to the defendant.[3]

If filth percolates from sewers by reason of their faulty construction and finds its way into the cellars of adjoining premises, the owner of the land is liable even when he is the owner of the premises into which the filth percolates, and the party complaining is his own tenant.[4]

A court will enjoin the erection and completion of a privy which in all probability will contaminate the well of a neighbor. Such erections are considered *prima facie* nuisances, and although necessary and indispensable in connection with the use of property for habitation, yet if built and allowed to remain in such a condition as to annoy others in the proper enjoyment of their property to the corruption and pollution of air or water, they are nuisances in fact.[5] The fact that a neighbor appropriates polluted water by artificial means, as by pumping, is immaterial where the right to the water exists.[6]

268. If Acts Amount to Nuisance.—There are cases in which the polluting or poisoning of underground waters has been held not to be a ground of action, and these cases, as before stated, may be reconciled by the explanation that the use to which the property has been put and which has caused the injury was a natural and proper one, and that the owner was free from negligence. In many cases the question is not one of property rights, but whether or not the defendant is guilty of a nuisance. Thus in a case where the owner

[1] Kingsbury *v.* Flowers, 65 Ala. 479; Clark *v.* Lawrence (N. C.), 6 Jones Eq. 83; Greencastle *v.* Hazelett, 23 Ind. 186.

[2] Ball *v.* Nye, 99 Mass. 582.

[3] *See* Baird *v.* Williamson, 15 C. B. N. S. 376; Fletcher *v.* Rylands, L. R. 3 H. L. Cas. 330.

[4] Alston *v.* Grant, 3 El. & Bl. 128. *And see* 27 Amer. & Eng. Ency. Law 439.

[5] Wahle *v.* Reinbach, 76 Ill. 322; DeGive *v.* Seltzer, 64 Ga. 423; Ross *v.* Butler, 19 N. J. Eq. 294.

[6] Ballard *v.* Tomlinson, 29 Ch. Div. 115.

of a gas-works has negligently and improperly placed upon the surface of his land and along the line of his neighbor's land and in his land, large quantities of coal-tar, gas-lime, and other offensive and noxious materials, which are washed by the surface-water into the well, and the same soaked and permeated into the ground and into the soil adjoining the well, whose waters are corrupted, it was held that the negligence in leaving such noxious substances on the land where the rain could wash them along the surface of the ground into the neighbor's well was actionable, and that it made no difference whether the substances were carried along the surface of the ground or were soaked into the soil and by means of water diffused according to natural laws. But the court held further that where such noxious substances had been buried within the soil, and had affected the subterranean currents of water by which the well was supplied, and had corrupted the water, the party placing the substances on or within his soil was not liable unless he acted maliciously.[1]

269. Negligence may Fix Liability.—In such a case, if negligence can be imputed to the owner of property, or the said owner had knowledge as to the existence of subterranean watercourses, there is little doubt but that he would be liable for the injuries; but when the business conducted upon one's land is legitimate and conducted with care and skill, it is sometimes held that there can be no liability if such subterranean waters become contaminated. The distinction is sometimes made between a contamination by soaking or percolation. Thus where an adjoining owner has dug a cesspool within fourteen yards of the plaintiff's well, so near that the liquid of the cesspool percolated through and contaminated the well, it was held that the defendant's use of the cesspool should be restrained.[2] It will be observed, however, that the contamination was by soaking or percolating of the sewage matter from the cesspool, and was not from the contamination of subterranean streams.

Justice Mitchell, in a case involving the question of pollution of underground waters, has said:[3] "The dividing line, between the right to use one's own and a duty not to injure another's is one of great nicety and importance, and frequently a difficult one. The Pennsylvania decisions have endeavored with unusual care to preserve the substance of both rights so far as their sometimes inevitable conflict may permit. With regard to the use and control of flowing water and of watercourses,[4] a case definitely settled the rule that, for unavoidable damages to one's land in the lawful use of one's own, no action can be maintained. No other result seems possible without restricting the use derogating from the full enjoyment and diminishing the value of property. The rule does not go beyond proper use and unavoidable damage. Every man has a right to the natural use and enjoy-

[1] Brown *v.* Illius, 27 Conn. 84.

[2] Womersley *v.* Church, 17 L. T. N. S. 190; Norton *v.* Scholefield, 19 M. & W. 665.

[3] Collins *v.* Chartiers Val. Gas Co., 131 Penn. St. 143.

[4] Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126.

ment of his own property, and if while lawfully in such use and enjoyment, without negligence or malice on his part, unavoidable loss occurs to his neighbor, it is *damnum absque injuria*. This is the rule as to surface-streams, but it is contended that as to subterranean streams, or at least percolation of hidden streams, the owner was not bound to pay any attention to the effect of his operations within his own land upon the land of others. . . . The use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. On the question of negligence the question of knowledge is always important and may be conclusive. Hence the practical inquiry is, first, whether the damage was necessary and unavoidable; secondly, if not, was it sufficiently obvious to have been foreseen, and also to have been prevented by reasonable care and expenditure?"

This was a case in which the defendant had drilled a well to a great depth for oil or gas, and with knowledge that salt water would probably rise and would destroy fresh-water springs and wells in the vicinity. It seems that there was no doubt but that precaution could have been taken to prevent this, and it was held that the absence of such care and regard for the rights of others as a prudent and just man would and should have taken in the same situation was negligence. If it were shown that the injury was plainly to be anticipated, and easily prevented with reasonable care and expense, it brought him within the exception of all cases which would excuse him from liability.[1]

If an owner of land by some unlawful or unreasonable use or sufferance allows water to collect upon his land and by percolation through the soil it reaches his neighbor's property and does harm, the former is liable for the damages sustained by the latter.[2] If the use were reasonable and lawful, it is doubtful if there would be any liability.

270. Injunction will Issue to Prevent Fouling of Ground-waters.—To prevent injury by the percolation of contaminating matter into the ground, a court of equity will grant an injunction.[3] A perpetual injunction was granted to prevent the flow of noxious and unfit refuse from a manufactory onto land, and which percolated into defendant's coal-mines.[4]

271. Motive an Element in the Destruction of Underground Waters.—In some jurisdictions the courts have held that the intent or motive prompting the party in his diversion or interference of underground waters was an important factor in determining the liability for the act, though not a controlling element.[5] If the motive which prompts a property owner to interfere or destroy the spring or well of his neighbor be one of pure maliciousness,

[1] Collins *v.* Chartiers Val. Gas Co., 131 Pa. St. 143. *And see* Pa. Coal Co. *v.* Sanderson, 113 Pa. St. 126; Wheatley *v.* Baugh, 25 Pa. St. 528; Acton *v.* Blundell, 12 M. & W. 324; Steele *v.* Todd (Pa. Sup.), 27 Atl. Rep. 942.

[2] Quinn *v.* Chicago, etc., Ry. Co., 63 Ia. 510 [1884].

[3] 27 Amer. & Eng. Ency. Law 438.

[4] Turner *v.* Mirfield, 34 Beav. 390.

[5] 27 Amer. & Eng. Ency. Law 433.

the courts have sometimes considered this motive, and have held the party liable for the damages resulting. It has been held that law would not permit a man to deprive another of a well, spring, or stream of water for the mere gratification of malice.[1]

It has been held to present a very different question when one made excavations on his land with the express purpose of diverting the water from his neighbor's spring or to his own well, knowing that this would be a natural result.[2] Where the owner of land on which springs are located obstructed their flow maliciously for the purpose of affecting the supply of one obtaining water therefrom, to compel the purchase of the springs, such obstruction was enjoined.[3]

It must be confessed that a law which requires the court to inquire into the motive of the person in the operations and manipulations of his own land is quite contrary to the general purpose of the law. The law generally deals with the outward acts of the person, and when the use which a landowner makes of his property is lawful in itself, the law will not take cognizance of the motive which prompts that use, even though it results in damage to another. The exercise of the legal right in one's own property should not be affected by the motive which controls it. The weight of authority is in favor of these general principles of the law.[4] The refusal or discontinuance of a favor can give no cause of action.[5]

As has been said in Pennsylvania, malicious motives make a bad act worse, but they cannot make an act which in its own essence is lawful a wrongful act.[6] Attention should not be given to the alleged motives of persons. Their motives are immaterial; the question is only as to their rights.[7] If an act be lawful in itself, resulting in injury to another, whatever may have been the motive with which it was done is in law a matter of indifference.[8]

272. Percolations which are Artificial or Enforced.—Percolations which are natural should be distinguished from those which are caused artificially, as by the collection and storage of fluids upon one's land. If a person make a reservoir, pond, or canal upon his land, and bring quantities of water thereon, which by percolation and permeation of the soil injures his neighbor, he is held liable for the damages resulting.[9] A canal constructed by authority of Parliament in such a manner as to leak into and cause injury to a mill has been held a sufficient cause to render the company owning and operating the canal liable for damages if guilty of negligence, and that the

[1] Wheatley *v.* Baugh, 25 Pa. St. 528; Wyandotte Club Co. *v.* Sells (Com. Pl.), 3 Ohio N. P. 210.

[2] Swett *v.* Cutts, 50 N. H. 439.

[3] Springfield Water-works Co. *v.* Jenkins, 1 Mo. App. Reptr. 699.

[4] 27 Amer. & Eng. Ency. Law 434.

[5] Mahan *v.* Brown, 13 Wend. 261. *And see* Old Colony River Co. *v.* Miller, 125 Mass. 1.

[6] Jenkins *v.* Fowler, 24 Pa. St. 308.

[7] Porter *v.* Durham, 74 N. C. 767.

[8] Frazier *v.* Brown, 12 Ohio St. 294; 27 Amer. & Eng. Ency. Law 435, *and cases cited.*

[9] Wilson *v.* New Bedford, 108 Mass. 261 [1871].

canal company was guilty of negligence as it might have prevented the damage. The same doctrine has been applied in Massachusetts,[1] where a city was authorized to take water from the Charles River for a water-supply by a statute which also provided that the town should be liable to any person injured by such taking. The city constructed a water-gallery on land near the river, which drew off by percolation the waters of the river through the natural soil between the gallery and the river. The city was held liable for injury by such taking. The court said that a different question was presented where the owner of land constructs his well or other structure in such a manner as to create an artificial underground current of water from a running stream, thus withdrawing water from the stream into his own land, under a claim of right that he is entitled to the water that is found in or coming to his land.[2] It is immaterial, it seems, as to how the city took the water, whether by pipes or by percolation through an artificial or natural embankment between the gallery and the river.[3]

A conveyance of land for the purpose of erecting a reservoir thereon is no bar to the recovery of damages by the grantor for injuries resulting to his adjoining land from percolations through the soil caused by the pressure of the water in the reservoir.[4]

It has frequently been held that if one collects and stores large quantities of water, as in a reservoir, and permits it to escape, he is liable for the consequences of the damage to others, however skillfully and carefully the accumulation was made.[5]

The owner of a quarry has been held not liable to another quarryman for the cost of pumping water from his quarry which found its way there from another quarry through the defendant's quarry.[6]

Property owners have been held liable for the wet, unwholesome, and unhealthful condition of a dwelling which was caused by packing against a wall large quantities of soil, coal, and limestone refuse through which the rain-water oozed and percolated through the wall and into the house.[7]

When noxious matter from defendant's factory was conveyed by a sewer into a hollow or ravine, and ran down on plaintiff's land, rendering it unfit for occupancy or pasture purposes, it is immaterial whether the ravine contained a watercourse, or whether the noxious matter was carried down the ravine by a violent rain-storm, or by water in the ravine.[8]

[1] Ætna Mills *v.* Brookline, 127 Mass. 69.

[2] *See also* Ætna Mills *v.* Waltham, 126 Mass. 422; Bailey *v.* Woburn, 126 Mass. 416; Wilson *v.* New Bedford, 108 Mass. 261 [1871]; Heacock *v.* State (N. Y.), 11 N. E. Rep. 638 [1887]; Smith *v.* Brooklyn, 46 N. Y. Supp. 141.

[3] Cowdrey *v.* Woburn, 136 Mass. 409.

[4] Wilson *v.* New Bedford, 108 Mass. 261 [1871].

[5] Rylands *v.* Fletcher, L. R. 3 H. L. Cas. 330; Nichols *v.* Marsland, L. R. 10 Exch. 255; Quinn *v.* Chicago, B. & Q. Ry. Co., 63 Iowa 510 [1884]. *See also* Show *v.* Whitehead, 27 Ch. Div. 588; Humphries *v.* Cousins, 2 C. P. Div. 239.

[6] Ulmer *v.* Farnsworth (Me.), 15 Atl. Rep. 65 [1888].

[7] Hurdman *v.* N. E. R. Co., 3 C. P. Div. 168. *See also* Broder *v.* Saillard, 2 Ch. Div. 692.

[8] Thomas *v.* Concordia Cannery Co., 68 Mo. App. 350.

Percolating waters belong to the owner of the land as much as the land itself or the rocks and stones in it; therefore the landowner may dig a large well and draw up the water by machinery or otherwise in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass with natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land; and the neighbor may, by a wall or other obstruction, retain the water which is upon his own land and prevent percolating waters from going from or coming into the soil. The owner may not, however, build embankments or raise a dam or construct a reservoir so as to cause an unnatural artificial pressure of the water through the soil and by its action flood his neighbor's structure (cellar).[1]

If quantities of water are collected in a sewer, the owner of the sewer must see that it is properly constructed and kept in repair, or be liable in damages for waters that escape and, percolating through the ground, cause injury to other property owners, as by injury to the foundations of structures.[2] It has even been held that when a landowner made excavations on his land and let in the sea, which undermined and injured the adjoining land, he was held liable for the injury to the well by the percolating salt waters.[3]

274. Negligence to Accumulate Waters under Pressure, and Permit to Escape.—This doctrine of the law with regard to artificial and enforced percolations has been qualified, as in the case of pollution by percolating waters, in many states by imposing the requirement that, in order to make the defendant liable, it must be shown that he has failed to exercise ordinary care and skill, i.e., must have been guilty of negligence.[4]

It has been held to be negligence for one to collect a large body of water into a limited space surrounded with a porous and gravelly soil without taking adequate precautions to confine it.[5]

The owner of a reservoir who shuts up the overflow-pipe, causing the water to overflow and, by means of a subterranean channel, run into the well of another, is guilty of a trespass.[6]

One who drills artesian wells on his lands and carries the water through a ditch for irrigating purposes, and allows the water to percolate through the ditch into his neighbor's land to his injury, is liable for the damages sustained.[7] The owner of a ditch is liable for damage caused by seepage of water from it.

[1] Wilson *v.* New Bedford, 108 Mass. 265; Fuller *v.* Chicopee Mfg. Co. (Mass.), 16 Gray 46. *And see* Gorham *v.* Cross, 125 Mass. 232; *But see* cases *note* 2, *p.* 179.

[2] Toledo *v.* Grasser, 12 Ohio C. C. 520; Comanche *v.* Zettlemoyer (Tex.), 40 S. W. Rep. 641. *And see* Cummings *v.* Toledo, 12 Ohio C. C. 650; Hitchins *v.* Frostburg (Md.), 11 Atl. Rep. 826 [1888]. *But see* Kennison *v.* Beverly, 146 Mass. 467.

[3] Mears *v.* Dole, 135 Mass. 508 [1883].

[4] 27 Amer. & Eng. Ency. Law 443, *many cases cited; semble* Reed *v.* State (N. Y.), 15 N. E. Rep. 735 [1888].

[5] Reed *v.* State, 108 N. Y. 407; Schuster *v.* Albrecht (Wis.), 73 N. W. Rep. 990. *See* Jutte *v.* Hughes, 67 N. Y. 267; Mairs *v.* Manh. R. E. Assn., 89 N. Y. 506; Clements *v.* State, 105 N. Y. 621.

[6] Odell *v.* Nyack Water-works Co. (Sup.), 36 N. Y. Supp. 206.

[7] Parker *v.* Larsen, 86 Cal. 236; Shields

The doctrine of contributory negligence does not apply in case of injury to land from the escape of water from a ditch, the owner of the ditch knowing of the defects therein and being able to prevent the injury.[1] If the collection, accumulation, and storage are in the first instance wrongful, the defendant has been held liable, although guilty of no negligence.[2]

275. Diversion and Obstruction of Underground Currents.—A landowner may not divert a well-defined underground stream of water which has a well-defined known channel. The landowner is entitled to take all the percolating waters in his land, but he may not do so if he cannot get at the underground water without diverting a well-defined subterranean stream.[3] A landowner may not dig a well near to the banks of a pond so as to create an artificial underground current of water. The burden of proof is upon the person who alleges the diversion of the waters of the pond, and he may recover damages only to the amount which he is able to prove.[4] Authority to take and hold certain waters and water-rights gives no right to dig wells so as to intercept percolating waters flowing to, or to draw off waters from, plaintiff's artificial pond, which he had the right to maintain, where the land upon which defendant dug its well was taken for a pumping-station and its appurtenances, and it did not thereby appear that the water to be pumped was to come from plaintiff's land.[5]

These cases are to be distinguished from those which have been treated hereinbefore, as in the case where one digs a ditch or works a quarry in the vicinity of a spring and thus intercepts the underground sources of said spring, and for which act the landowner is not liable.[6] The distinction to be made is whether the excavations draw water from the original underground sources by which the spring is supplied, or whether they draw the water directly from the spring or creek flowing therefrom.

A city which constructs a conduit lower than the surrounding territory, the soil of which is such as to admit of ready percolation of water, with knowledge that it will draw water from the surrounding territory to such conduit, is liable for damages caused by the failure of a brook and pond in such territory which have been in existence for more than fifty years.[7] This is so even though the destruction is caused by the diversion of the water before it reaches the stream.[8]

v. Orr Ex. Ditch Co. (Nev.), 47 Pac. Rep. 194; Schuster *v.* Albrecht (Wis.), 73 N. W. Rep. 990; Reed *v.* State (N. Y.), 15 N. E. Rep. 735 [1888].

[1] Shields *v.* Orr Extension Ditch Co. (Nev.), 47 Pac. Rep. 194.

[2] Frye *v.* Moor, 53 Me. 583.

[3] Chasemore *v.* Richards, 7 H. L. Cas. 349; McClellan *v.* Hurdle, 3 Col. App. 430; Gd. Junc. C. Co. *v.* Shugar, L. R. 6 Ch 487.

[4] Emporia *v.* Soden, 25 Kan. 588.

[5] Hollingsworth & V. Co. *v.* Foxborough W. S. Dist. (Mass.), 42 N. E. Rep. 574.

[6] Ellis *v.* Duncan (N. Y.), 21 Barb. 230; Goodale *v.* Tuttle, 29 N. Y. 466.

[7] Smith *v.* Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; *citing* Chasemore *v.* Richards, 7 H. L. Cas. 349; Acton *v.* Blundell, 12 Mees. & W. 324, 350; Wheatley *v.* Baugh, 25 Pa. 528; Frazier *v.* Brown, 12 Ohio 294; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 569; Swett *v.* Cutts, 50 N. H. 445.

[8] Smith *v.* Brooklyn, 18 App. Div. 340. *But see* Dickinson *v.* Grand Junction Canal Co., 7 Exch. 282.

CHAPTER XV.

OIL AND GAS. OWNERSHIP, AND APPROPRIATION OF OIL AND GAS.

281. Oil and Gas Compared to Percolating Water.—The author has given a good deal of space and attention to the subject of underground waters for the reason that the law as set forth in those sections devoted to percolating water applies almost without qualification to oil and gas. In the eyes of the law oil, gas, and water are minerals, and while in place are part of the land itself. They belong to the owner of the land, and are a part of it so long as they are on or in it and are under his control; but when they escape and go on to another's land or come under another's control the title of the former owner is gone.[1]

Whether they percolate through the rock or exist in pools or deposits, they form a part of that tract of real estate in which they tarry for the time being; and when they leave one tract and enter another, they become a part of the realty of the latter.[2]

What has been said of percolating waters can be applied in every case where the subject of ownership of oil and gas is at issue; and what has been said in regard to the polluting of waters would doubtless apply with equal force to oil or gas, the only difference probably being that the damages suffered would be far less in the case of oil and gas, the natural purity not being so essential as in the case of water.

282. Nature and Character of Natural Gas.—In connection with other carbonaceous deposits, such as coal and petroleum, there is often found inflammable gas. When these gases escape by means of fissures or seams, or pipes sunk into the earth, they may be collected and burned for heating or illuminating purposes, and are designated by the term "natural gas." This gas is a mineral, and is subject to the same laws that govern ordinary minerals, with such qualifications as are necessary by reason of its nature and physical properties. It is governed by rules analogous to those governing water percolating beneath the surface. Water, oil, and gas are sometimes

[1] Westmoreland & C. Nat. Gas Co. *v.* DeWitt, 130 Pa. St. 235; Keir *v.* Peterson, 41 Pa. St. 362; Brown *v.* Vandergrift, 80 Pa. St. 147; Dark *v.* Johnson, 55 Pa. St. 164.

[2] Kelley *v.* Ohio Oil Co., 57 Ohio St. 317 [1897].

placed in a class by themselves, and have been denominated as minerals *feræ naturæ*.[1]

Natural gas is not subject to absolute ownership. Like percolating water, it belongs to the owner of the land and forms a part of it so long as it is in the land and subject to his control; but when it escapes and goes into other land or comes under the control of another, the title changes. Possession of the land is not necessarily possession of the gas. If an adjoining owner drill a well and draw from his neighbor's land the gas so that it comes under his control, it is no longer his neighbor's, but belongs to him.

The owner of land which contains oil or gas has the same rights and may employ the same methods to obtain control of such oil or gas as permeates his soil, or to induce it to flow therein from the land of his neighbors, as he has in percolating water. The courts have refused to enjoin the landowner from permitting gas to escape on his premises and go to waste where no other injury is done or shown than the depletion of the gas-basin in which the land of the parties is situated.[2] The drilling of wells by each owner of adjoining oil lands along the division-line, so that each may obtain the amount of oil contained in his lands, affords ample remedy to prevent one operator from obtaining more than his share of oil.[3]

283. Gas and Oil in Grants of Mineral Rights.—Oil and gas, being minerals, form part of the land when in place, and are a part of the realty. Whenever a conveyance is made of them it is in effect a grant of a part of the corpus of the estate, and it should be effected in the same manner and by the same ceremonies as real property is conveyed.[4]

Petroleum, rock, or carbon *oil* has been held not to include natural *gas*,[5] and whether or not the words "other valuable volatile substances" includes natural gas is a question for the jury, as the words have no well-defined meaning.[6]

A conveyance of "mines and minerals" does not embrace everything in the mineral kingdom as distinguished from what belongs to the animal and vegetable kingdoms.[7] Petroleum is so much a mineral in character that the lands from which it is obtained have been held to be mining lands under an act of the state of Pennsylvania.[8] It is a mineral product within the revenue law.[9] Yet the ordinary meaning of the word "mineral" may overcome the technical meaning when it is the evident intention of the parties not to include petroleum in a reservation of the minerals in a deed.[10]

[1] 16 Amer. & Eng. Ency. Law 221.
[2] Hague *v.* Wheeler, 157 Pa. St. 524, 27 Atl. Rep. 714.
[3] Kelly *v.* Ohio Oil Co., 57 Ohio St. 317.
[4] Stoughton's Appeal, 88 Pa. St. 198; Barker *v.* Dale, 3 Pittsb. (Pa.) 190. *But see* Willetts *v.* Brown (N. Y.), 42 Hun 140.
[5] Truby *v.* Palmer (Pa.), 4 Cent. Rep. 925, 6 Atl. Rep. 74 [1886].
[6] Ford *v.* Buchanan, 111 Pa. St. 31.
[7] Hartwell *v.* Camman, 10 N. J. Eq. 128.
[8] Gill *v.* Weston, 110 Pa. St. 313.
[9] Thompson *v.* Noble, Pittsb. (Pa.) 201; 11 Min. Rep. 137.
[10] Dunham *v.* Kirkpatrick, 101 Pa. St. 43.

From the nature of gas and gas operations, the grant of gas-well rights is necessarily exclusive. A lease of the land for the express and sole purpose of mining and taking carbon oil therefrom at a fixed royalty has been held to permit the tenant to appropriate the gas which escaped from the oil-well by its own force. The court argued that, as it was necessary to keep the well open in order to obtain the oil, and as the gas escaped of its own natural force into the air, the tenant was entitled to control and appropriate the gas, though he would not be permitted probably to pump it if it required to be pumped.[1]

Natural gas has been held not to be "heat," nor can a company incorporated to supply "heat" furnish natural gas.[2] It is a fuel,[3] and as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. A statute forbidding its transportation from the state is void, for it is in conflict with the Constitution of the United States, which provides that the regulation of interstate commerce shall be in Congress.[4]

In an insurance policy which excepted "loss or damage by explosion, except from explosion by *gas*," the word was held not to include an inflammable and explosive vapor evolved in the process of extracting oil from shoddy.[5]

A grant to sink test-wells for oil and to take all oil raised, reserving one-third to the grantor, with a condition that if operations were abandoned all property rights should revert to the grantor, was held to create an incorporeal hereditament—a *profit a prendre*.[6]

284. Rights Incident to the Operation of Gas- and Oil-wells.—An interesting case of trespass and the matter of rights of way arose in the case where the owners of a coal-mine sought to enjoin the owners of the surface of the ground from boring a gas-well through their strata of coal, on the ground that it was a trespass attended with great dangers to the lives of the miners and the property of the mine-owners, and the fact that the gas could not be controlled. At first the court denied the injunction upon the ground that the act of the surface owner would be a mere trespass for which an adequate remedy was offered in an action at law. On the following day the court reversed its former ruling, placed its decision principally upon the probable danger of driving a gas-well through a mine, although it was the court's opinion that it would be some day possible to dig such a well in such a place. The court also held that the surface owner had no right of way of necessity through the vein of coal to his land beneath it, a reservation of such a way not having been made.[7]

[1] Wood Co. Pet. Co. *v.* West Va. Trans. Co., 28 West Va. 210.

[2] Emerson *v.* Com., 108 Pa. St. 126.

[3] Citizens Gas, etc., Min. Co. *v.* Elwood, 114 Ind. 338.

[4] State *v.* Indiana, etc., Gas, Oil & Min. Co., 120 Ind. 579; Carothers *v.* Philadelphia Co., 118 Pa. St. 468.

[5] Stanley *v.* Weston Ins. Co., L. R. 3 Ex. 71.

[6] Funk *v.* Haldeman, 53 Pa. St. 243.

[7] Jefferson I. Wks. *v.* Gill Bros., 14 W. L. Bull. 2. *And see* 30 Cent. Law Jour. 503. In the matter of horizontal divi-

A later case in the United States courts held that the drilling of an oil- or gas-well through a part of a coal-mine from which all the coal has been extracted except what is necessary for the props does not by its mere physical damage to the mine, or its effect as an obstruction, threaten such an injury to one owning the coal and the right to mine it as will warrant the issuance of a preliminary injunction; nor will an injunction issue to restrain interference with certain deep-lying veins, where on the affidavits it appears doubtful whether those veins extend under the tract.[1]

The owner of mineral land has a right to take away the whole of the minerals in his land, for such is the natural course of the user of such land, and if, in the course of such user, water accumulates on his land, either on the surface or under ground, and then passes off, by the operation of the laws of nature, into the ground of his neighbor, his neighbor has no legal cause of complaint; but where one of the two adjoining mine-owners conducts into his neighbor's mine water which would not otherwise go there, or causes it to go there at different times and in greater quantities than it would go there naturally, he commits a legal wrong.[2]

If a contractor undertake to drill a gas-well to a certain depth and of a certain size, he must comply literally with the contract even though no gas was found, and even though a well of smaller size is just as effective in determining that no gas is to be found at that depth.[3]

When a company has leased and is using natural-gas wells, it may not be interfered with by the lessor if such interference is likely to result in irreparable injury, and the lessee may have an injunction to prevent such interference.[4]

It has been held contributory negligence to carry a lighted lantern near an oil-well where the escaping gas could be smelled and heard.[5]

285. Gas Companies, their Incorporation, Organization, and Control.—Gas companies are subject to the same control and restraint generally as are water companies. They are *quasi*-public institutions and derive the power to occupy streets, to furnish gas to the public, and to exercise other special privileges, from the legislature either directly or through the municipal corporation. By reason of such concessions the companies must serve the public without discrimination, and must adopt reasonable rules and regulations. In fact what has been said of water companies will apply almost without qualification to gas companies.

286. Ownership of Minerals and Metals in Land.—The laws pertaining to the baser metals and minerals are based upon the common law that applies

sions land, *see* 1 Amer. Law Reg. (N. S.) 577 [1862], *and cases cited.*

[1] Rend *v.* Venture Oil Co. (Cir. Ct.), 48 Fed. Rep. 248.

[2] Lord *v.* Carbon Mfg. Co., 42 N. J. Eq. 157 [1886].

[3] Gillespie Tool Co. *v.* Wilson, 123 Pa. St. 19. *And see* 30 Cent. Law Jour. 503.

[4] Citizens' Nat. Gas. Co. *v.* Shenango Nat. Gas Co. (Pa.), 20 Atl. Rep. 947 [1890].

[5] McClafferty *v.* Fisher (Pa.), 2 Atl. Rep. 610 [1885].

o property in land. They comprise the mining of coal, iron, and other ores, clay, sulphates, and phosphates, and the quarrying of stone whether for building or manufacturing purposes. These belong strictly to the owner of the land unless they have been separated and granted away by the owner or his grantors. His rights in them will be protected by the courts, and if the acts complained of are irremediable and destroy the substance of the property, as in the case of extracting ores, an injunction will issue in order that the property may be preserved from destruction during such time as may be necessary to try the title at law.[1]

The laws pertaining to the mining of precious metals in the western states and territories, and in fact the laws which determine the property in the precious metals themselves, are largely based upon the custom among the miners, and which prevailed at the mining camps before any government or courts had been established. They do not generally depend upon the common law, and are matters for local study.

The subject of mining is too broad to treat within the limits of this book. There are excellent works upon the subject, and the reader is referred to them.

[1] **Buskirk *v.* King (C. C. A.), 72 Fed. Rep. 22.**

CHAPTER XVI.

ELECTRICITY. PROPERTY RIGHTS AFFECTED BY THE USE AND DISCHARGE OF ELECTRICITY.

291. Properties and Character of Electricity.—Electricity is not a fluid as is popularly supposed. It is a phenomenon attended by certain disturbances, when it acquires a certain intensity, which are known by the effects upon material substances, and is apparent to the senses by the shock it causes to the human system, or by the work performed. In discussing electricity and the various phenomena attending it, it is very convenient to speak of it as a fluid and as being under a certain pressure (potential), designated by volts, instead of pounds per square inch; and as being a certain measured quantity (amperage), designated by the number of amperes instead of by the number of cubic feet or gallons. Electricity, when confined and transmitted over or through well-defined channels, partakes very much of the character of a fluid, and it is convenient to designate it as such and speak of it as such even in scientific and industrial circles where practical applications of it are made.

Electricity, however, is not a fluid nor a substance which can be handled in the sense that a material object or substance is handled. It is a vibratory condition of a material substance, and is not confined to any particular substances only to the extent that the electrical condition varies in different substances under the same circumstances and conditions, its effect being usually greatest in the metals and mineral substances. The earth, being largely composed of metallic and mineral substances, is therefore readily affected by electricity, and assumes an electrical condition the degree of which will somewhat depend upon the metallic substances, naturally inherent to the earth or ground, or placed therein by artificial means.

292. Electricity Compared with Heat, Light, Sound, and Other Vibratory Conditions.—Electricity is as much a condition pervading the receptacle, holder, or conductor which contains or conveys it as are the phenomena of sound, light, or heat when they are transmitted through the air or water or when they (as heat often does) pervade the earth. Very much the same condition exists when an object is charged with electricity as would prevail if it were heated to a high temperature; the intensity of the heat corresponding to the potential of the electricity. Except that electricity travels with more facility and in more direct paths, it is quite as correct to speak of the "*flow*

of heat," or the "*current* of heat," or the "heat *fluid*," so far as it implies a material substance called *heat*, as it is to apply the same words and phrases in connection with *electricity*. Electricity, like heat, is merely a vibratory condition of a substance, which has the power of communicating its phenomena to other material substances brought in contact with, or in its vicinity and within its sphere of susceptible influence. When, therefore, a person or a large power, lighting, or transportation company changes or intensifies the electrical condition of a neighbor's land or structures, it is much the same disturbed condition that would prevail if the temperature of such land and structures had been greatly increased, or if intense light or an unbearable noise had been created. If the public at large suffer, such conditions may be abated as public nuisances, as would be the case with light, noise, or heat; and if an individual suffer in the enjoyment of his estate, he may enjoin the operation of such plants as cause the disturbed condition, or he may recover in an action for damages.

The phenomena of electricity, being more intense and violent, and pervading freely almost all substances, are more far-reaching and violent in their effects; and by reason of the tendency of electricity to seek an avenue of least resistance, its effects are more limited to such paths. Therefore only those neighbors suffer whose land or structures lie in such path. Such an electrical condition, therefore, more often creates a private nuisance, so called, and is more likely to present a case for an action for damages than one for an injunction, and more frequently a nuisance by *omission* than one by *commission*.

When one acquires land with certain deposits or structures or vegetable growths which are a part thereof, he acquires the right to hold, own, and enjoy the land in the condition in which he purchased it, and any one who changes or destroys that condition is liable for the injuries which the landowner may suffer in consequence. Land contains mineral substances which may constitute the soil thereof as the substrata of clay, sand, gravel, rocks, etc., as the case may be; and in addition thereto valuable minerals, such as coal, precious metals, gems, water, oil, and gas. It also possesses the phenomena of gravitation, of warmth, and of electricity, conditions which are and always will be inherent therein. This electrical condition may change and vary from causes but little understood or not fully accounted for.

If it were within the power of a neighbor to destroy the attraction of gravitation inherent to one's land, there would be but little doubt that the landowner would, by the laws of our country, have a right to damages for the injuries caused; and for the same reasons a landowner should be indemnified for any damages that he suffers in consequence of a change in the electrical condition of his land by known and determined causes created by another.

Electricity in its ordinary state is not appreciable to the five senses. It is only when it is collected and stored under pressure (potential) and then suddenly discharged that it is capable of creating mischief or of being used in any of the industrial applications. It is true that when the potential of

the clouds becomes much greater or much less than that of the earth, violent discharges attend in nature, as in the well-known phenomena of lightning and thunder; but these are not within the control of man, and their treatment need not be pursued here. It is believed that in every instance where electricity is capable of doing harm or of causing material damage, it is where it has been confined or accumulated in large quantities under pressure (potential) and then allowed to escape in such a manner as to create violent disturbances. When it has been accumulated and discharged in such a manner, and the parties who have caused the injuries can be determined, they should be liable for the consequence resulting from its effects.[1]

The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to make the courts hesitate in declaring the exact liability from electrical disturbances. Responsibility cannot be diminished or avoided because the actor has aided in the accomplishment of the result of a natural law. The person injured has a right to object to the projection upon his premises, by unnatural and artificial causes, of an electric current in such a manner and with such intensity as to materially injure its property.

It cannot be questioned that one has the right to accumulate water upon his own property and use it for a motive power; but he cannot discharge it *there* in such quantities that, by the action of physical forces, it will inundate his neighbor's land and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature, that caused the damage. If a subtle and imperceptible electric fluid be collected for pleasure or profit, the same duty is exacted of the owner who collects and stores it as is required of one who accumulates water, air, or gas under high pressure, namely, that of providing an artificial reservoir or conduit to safely store or transmit the artificial product and to prevent injury to others.[2]

293. Injuries Result from Escaping or Induced Electric Currents.—The injuries which result from the use of electricity are those which arise from the escape of the electricity or from the currents induced by the current in other conductors. These escaped or induced currents cause disturbances to other electrical instruments or apparatus owned or controlled by landowners or by other companies; or they may cause the disintegration and gradual destruction of lines of pipes or structures which they traverse, by the phenomenon known as electrolysis; or they may render structures or things which become the path of such currents dangerous to animals that come in contact with them.

[1] Watervliet Tpk. & R. Co. *v.* Hudson Riv. Teleph. Co., 61 Hun 141 [1891], 135 N. Y. 393 [1892]; Fletcher *v.* Rylanders, L. R. 1 Ex. 265, 3 H. L. 330; National Bell Teleph. Co. *v.* Baker (Eng.), 2 Ch. 186 [1893].

[2] Hudson Riv. Teleph. Co. *v.* Watervliet Tpk. & W. Co., 135 N. Y. 409, 410; Keasbey on Electric Wires 243.

The escaping of currents is usually caused by virtual contact between the conductor of the current and some other line or structure which is of metal and which forms a good conductor for the escaping current. A high current of electricity will select that route or pathway of return to the source where it is generated that requires the least energy, which will be the shortest and quickest and at the same time the path of least resistance. Therefore, currents frequently escape from the conductors which are intended to carry them, and lines of pipe or continuous structures become surcharged with electricity so as to render them dangerous, or disintegrate the line or structure itself over which they travel, if the connection be not such as to afford a short and easy pathway for the electricity. Thus an electric-light wire may come in contact with a telephone wire and cause injury to the instruments upon the telephone line and destroy its use as a telephone line, or even render it dangerous to those who may attempt to operate it. Currents of electricity generated by electric-railway and electric-light companies who utilize the ground for the return to the generator, often travel over lines of gas- or water-pipes or a metal structure, instead of returning by the most direct pathway through the earth, the metal pipe of the pipe-lines or the steel frames of the structures affording a better conductor for the currents than do the mineral substances of the earth. Where the current leaves the surface of the metal, as in a damp place underground, chemical action called "electrolysis" frequently takes place which causes the slow corrosion of the metal, which in the course of time produces serious injury to the pipes or to the structure.[1] In order to cause electrolysis or the burning out and destruction of telephones, the current must have escaped from the primary conductor, and in large quantities, at high potential.

A current may be induced in a line of metal pipes or rails, or in telephone or telegraph lines, by other currents passing in close proximity. It is a well-known phenomenon of electricity that whenever a current is passing near to another conductor a similar current will be induced in the opposite direction in the second conductor, so that if two lines of wire are running close together, a current in one wire will induce an exact counter-current of less intensity in the other wire, and if a telegraph message or even a telephone message is being sent over one wire, the same pulsations and breaks will be created in the second wire, and the conversation going on in the first wire may often be distinctly heard in the telephones connected with the second wire; and if a dynamic current be passing over the first wire, its pulsations will make such a buzzing sound in the telephones connected with the second wire as to entirely drown the sounds of the voice. A telephone requires a delicate pulsating current, and an alternating or discontinuous current passing in a wire alongside of a telephone will frequently utterly destroy its use for pur-

[1] For the principal case on electrolysis *see* Case Gold on behalf of Peoria Water Company *v.* Central Railway and Peoria and Prospect Hts. Ry. (Illinois courts) [1900], *not yet reported.*

poses of telephoning. If both the dynamic current wire and the telephone wire are connected with the earth and depend upon it for return to the generators or battery, the disturbance will be even greater, rendering the more delicate operation of telephoning quite impossible.

The uses of these currents of different characters and potentials in proximity with one another, and for the several purposes for which electricity is employed, are what give rise to the suits and actions for electrical disturbances. Much of the trouble and difficulty can be avoided if one or the other of the parties suffering adopt or use a metallic circuit for return to the battery or generator, instead of using the earth for a return; and if the currents of varying intensities be kept at respectable distances from one another. The electric-light companies usually employ the metallic return circuit, which reduces largely the interference with their electrical operations. In electric railways the rails of the track are generally used for a return circuit. Not being insulated, more or less of the current escapes from the track. This is obviated in a large degree by connecting each rail with the succeeding rail by a wire called a bond, and by placing a return copper wire in the ground between and connected to the rails, upon which wire the current returns to the generator. The double trolley system, which consists of a direct and a return metallic circuit insulated from the ground, is the safest and best, but it is so expensive to build and complicated to operate that it has not been generally adopted.

294. Electrical Litigation is Between Owners of Franchises and Not Landowners.—Almost all the litigation over disturbances by electricity has been between those companies or persons using high potential electricity and those using low potential electricity; such are electric-light companies and trolley lines of the former class, and telegraph and telephone companies of the latter class. As these companies are usually corporations which are not landowners, but which possess franchises or privileges granted by the government to occupy the public ways of the country or the streets of villages and cities, the cases where landowners' rights have been interfered with by electric companies are very few.

In the case of companies holding franchises the question of *priority* of occupation of the road or street has an important bearing upon the rights of the parties; also the question as to which use of the streets or roads is a use *incident to travel* and therefore incident to the proper use of the way, it being frequently held that an electric-trolley line or an electric-light line is such a use, and that telegraph and telephone lines, not being incidental to street purposes, have not the same rights and privileges that an electric light or trolley line has. The determination of such rights, therefore, is not based or dependent upon the ownership of land, nor are the rights to be determined dependent upon or incident to the ownership of land. Being incidental to the right of way, they are treated in a later part of the book, so far as they affect easements of rights of way, telegraph, and telephone lines in public ways.*

* *See* Secs. 798, 799, and 827–832, *infra*.

295. Litigation over Electrical Disturbances between Public Corporations.—The law as to the rights of companies to the protection of the courts from disturbances of other companies' lines is by no means definitely settled. Telephone and telegraph companies which, with the consent of the authorities, have spent much money in building up a profitable business of great utility insist that they are entitled to protection against the use of the streets by other companies for other and more powerful currents which injure their business and impair the value of their property.

In the earlier cases where these companies had built their lines and established their business prior to the construction and operation of the electric light and electric railways this right was conceded, and it was generally held that the former companies should not be required to adopt new and expensive devices for neutralizing the effects of the new currents if their effects could be prevented by the latter companies using them by any feasible methods and at a reasonable cost.[1]*

To prevent induction in telephone or telegraph wires, electric-light and electric-railway companies have been enjoined from stringing their wires parallel to telephone or telegraph wires and nearer than a designated number of feet, or for a linear distance greater than that designated.[2] In a number of the cases the element of danger from contact by reason of having wires in such close proximity entered into the case, but to what extent it is impossible to determine.[3]

While no person or company has an exclusive right to the use of any part of a highway, yet when one is first on the ground by permission of the proper authorities the courts will protect him against injurious interference with his property or business if such injuries can be avoided.[4]

In these cases the telephone or telegraph companies had priority in occupying the street with their lines, and in some of the cases relief was denied when the electric light or power companies had first erected their lines.[5] These earlier cases were followed by decisions to the effect that where the

[1] Nebraska Teleph. Co. *v.* York Gas & Elec. Co., 17 Neb. 284 [1889]; Western Un. Teleg. Co. *v.* Guernsey, etc., Co., 46 Mo. App. 120. *But see* Rocky Mt. Teleph. Co. *v.* Salt Lake City Ry. Co. (Utah), 3 Amer. El. Cas. 350, 356, *and* Wisconsin Teleph. Co. *v.* Eau Claire St. Ry. Co., 3 Amer. El. Cas. 383.

[2] Nebraska Teleph. Co. *v.* York G. & Elec. Lt. Co., 17 Neb. 284, 43 N. W. Rep. 126 [1889], which fixed the minimum distance apart of incandescent light and telephone wires at eight feet, or for more than three hundred linear feet, and prohibited arc lights from being strung parallel on same side of street; Western Un. Teleg. Co. *v.* Guernsey & Scudder Elec. Lt. Co., 46 Mo. App. 120 [1891]; West. Union Teleg. Co. *v.* Champion Elec. Ltg. Co., 14 Cinc. Week. Bull. 327, where an injunction was refused when the electric-light wires were parallel and three or four feet distant from telegraph lines. *See also* Bell Teleph. Co. *v.* Belleville Elec. L. Co., 12 Ontario Rep. 571 [1886].

[3] Bell Teleph. Co. *v.* Belleville Elec. L. Co., 12 Ont. Rep. 571.

[4] Bell Teleph. Co. *v.* Belleville E. L. Co., 12 Ont. Rep. 330 [1886]; Western Un. Tel. Co. *v.* Guernsey, etc., Co., 46 Mo. App. 120. *But see, contra*, East Tenn. Teleph. Co. *v.* Knoxville St. Ry. Co. (Tenn.), 3 Amer. El. Cas. 400 [1890]; Watervliet Tpk., & R. Co. *v.* Hudson Riv. Teleph. Co., 135 N. Y. 393 [1892].

[5] Nebraska Teleph. Co. *v.* York G. & E. L. Co., 17 Neb. 284.

* *See* Secs. 827–831, *infra*.

expense of protecting such vested rights was small, if undertaken by the company suffering the disturbance, as compared with what it would have cost the electric light or power company to prevent the injury, an injunction would be, and often has been, refused, and the party suffering left to an action for damages for the injuries, the measure of which was sometimes held to be the cost of protection.[1]

296. Superior Rights in Streets Determined by Uses Incident to Travel. —Another element that has been a strong factor in determining the rights of telephone and telegraph companies in opposition to those of electric light and power companies is that the latter are sometimes held necessary and primary uses of streets for public travel, while the former are not. The Post-road Act expressly provides that the privileges conferred upon a telegraph company shall not interfere with ordinary travel.*

In accord with this view there is a line of cases that hold that the franchise of a telephone company to use the streets is subservient to the rights of the public to use them for new and improved modes of travel; that a franchise granted by the legislature for such a purpose confers a right paramount to a telephone or telegraph company; and that if the operation of a street railway under such a franchise disturb a telephone company's apparatus, the latter must meet the new condition.[2] Therefore where an electric-light company also furnished power to individuals for domestic and manufacturing purposes, it was held that the fact that the electricity was used in part for street purposes did not give the light company superior rights that would outweigh a prior occupancy by a telegraph company.[3] In another case in an inferior court it was held that as between two electric-lighting companies each having permission to use the street and each furnishing light for business and domestic purposes, the company which had the contract for lighting the streets and public places had the superior right even though the other company were prior in time of occupation.[4]

Injunctions to prevent the use of the single-trolley system of street railways have frequently been sought, and have sometimes been granted,[5] and at other times been refused.[6] If a telephone company be required to protect

[1] Central Un. Teleg. Co. *v.* Sprague E. Ry. & M. Co. (Ohio Com. Pl.), 2 Amer. El. Cas. 307 [1889]. *Cases cited in note* 1, *p.* 189.

[2] Cinc. Inc. Ry. Co. *v.* City, etc., Teleph. Assn., 48 Ohio St. 390 [1891]; Watervliet Tpk. & R. Co. *v.* Hudson Riv. Teleph. Co., 135 N. Y. 393. *Accord*, Wisconsin Teleph. Co. *v.* Eau Claire St. Ry. Co. (Wis.), 3 Amer. El. Cas. 383 [1890]; Birmingham Trac. Co. *v.* Bell Teleph. Co. (Ala.), 24 So. Rep. 731 [1898]; National Bell Teleph. Co. *v.* Baker (Eng.), 2 Ch. 186 [1893]. *And see* Pennsylvania Teleph. S. Co. *v.* Wilkesbarre & S. W. Ry. Co., 11 Pa. Co. Ct. Rep. 417.

[3] Western Un. Teleg. Co. *v.* Los Angeles E. L., 76 Fed. Rep. 178.

[4] Terre Haute El. L. & P. Co. *v.* Citizens' El. L. & P. Co. (Ind. Super. Ct.), 6 Amer. El. Cas. 193 [1895].

[5] East Tenn. Teleph. Co. *v.* Chattanooga El. Ry. Co. (Tenn. Ch.), 2 Amer. El. Cas. 323 [1889]; Wichita & Sub. Ry. Co. (Kans. Dist. Ct., Sedgwick County) [June 29, 1889].

[6] Central Union Teleph. Co. *v.* Sprague E. Ry. & Motor Co., 2 Amer. El. Cas. 307 [1889]; Wisconsin Teleph. Co. *v.* Eau Claire St. Ry. Co., 3 Amer. El. Cas. 383 [1890].

* *See* Secs. 798–841, *infra.*

itself by new devices and appliances, it seems that the cost of such remedies may be recovered in an action at law.[1]

Some of the cases refuse any relief to telephone or telegraph companies from earth current, for the reason that to do so would give to them a monopoly for its feeble current of the earth within a considerable radius, against all other forms of electrical energy which might require its use; making the determination of the question of whether an injunction should issue one of comparative degree or extent, and considering the delicate sensibility of the telephone to ordinary dynamic currents, and the small expense at which the telephone company could secure effective relief, compared with what it would cost the railway company.[2]

The English courts have criticised the American courts in one respect in their determination of the rights of *companies* engaged in the use of electricity, wherein they have excused the owner of land, in using his land for an unnatural or extraordinary purpose, from responsibility for the consequences of such user to his neighbor except when they result from his negligence. The doctrine of the case of Cumberland Telephone Co. *v.* United Electric Railway Co., that where a person is making a lawful (?) use of his own property or of a public franchise in such manner as to injure another, his liability depends on the fact that he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best, and that he is not bound to experiment with recent inventions not generally known, or to adopt expensive devices when it lies in the power of the person injured to adopt an effective and inexpensive method of prevention, is questioned.[3]

The doctrine of negligence or due care and skill is applied to cases where injury results from contact of wires; and it is equally the duty of both companies using electricity to protect their lines so that they shall not come in contact. Mandamus will issue to require an electric railway to maintain guard-wires to prevent contact in anticipation of falling wires or poles breaking. The question of negligence or failure to take proper precautions is a question for the jury under proper instructions.[4]

As the use of electricity for lighting and power purposes extends over but a few years, the cases upon the subject of disturbance, interference, and physical injuries are necessarily few. Such as there are have been collected and published recently in a book by Mr. Edward Q. Keasbey, of the New Jersey bar, to which the reader is referred.

[1] Central Un. Teleg. Co. *v.* Sprague E. Ry. & Motor Co. (Ohio Com. Pl.), 2 Amer. El. Cas. 307 [1889]; *semble*, Watervliet Tpk. & R. Co. *v.* Hudson Riv. Teleph. Co., 61 Hun 141; *but see* 135 N. Y. 393. *Contra*, Cumberland Teleph. Co. *v.* United Elec. Ry. Co., 42 Fed. Rep. 273.

[2] Cumberland Teleph. Co. *v.* United Elec. Ry. Co., 42 Fed. Rep. 273. *And see* National Bell Teleph. Co. *v.* Baker (Eng.), 2 Ch. 186 [1893].

[3] Cumberland Teleph. Co. *v.* United Elec. Ry. Co., 42 Fed. Rep. 273.

[4] Keasbey on Electric Wires 242.

CHAPTER XVII.

LIGHT AND AIR INCIDENT TO LAND.

301. Free and Uninterrupted Use of Light and Air Incident to Land.—The owner of land has the right to the enjoyment of the uninterrupted passage of the light over his land, and to the free circulation of the air above it in a reasonably pure and wholesome condition. Anything which deprives him of this enjoyment by charging the air with dust, smoke, and noxious gases and vapors, thus producing injury to property, health, or comfort, is a nuisance. The law will not hesitate to declare such impurities a nuisance when they permeate the atmosphere in unreasonably dense volumes, or when they are so carelessly or unskillfully disposed of as to produce an interruption of the comfortable enjoyment of life or property.

Certainly some degree of impurity will be permitted, for a man cannot occupy his dwelling and consume fuel in it, for domestic purposes, without its impairing the natural purity of the air to some degree. A building cannot be erected or a tree planted near the house of another without in some degree diminishing the quantity of light which the adjoining owners enjoy, but such small interruptions will not give a right of action, for they are necessary incidents to the common enjoyment, by all, of their rightful possessions. The pollution of air or the obstruction of the light must be to such an extent or degree as causes an inconvenience materially interfering with the ordinary physical comforts of human existence, and not an existence merely according to the elegant and dainty modes and habits of living, but according to the plain, sober, and simple notions that obtain among the people.[1] The degree of smoke permissible in the atmosphere will depend somewhat upon the commercial character and the size of the community, as more or less pollution is an unavoidable feature of living in modern times, and especially in cities. It cannot be expected that an atmosphere shall be entirely free from artificial impurities, but only an atmosphere as free and pure as could reasonably be expected in view of the location and the business of the community.[2]

The law recognizes only a tangible or visible injury from smoke, dust, or noxious vapors, and the injury must result from an unreasonable use of the

[1] Walter *v.* Selfe, 4 Eng. Law & Eq. 486.
15; Embry *v.* Owen, 4 Eng. Law & Eq.
[2] Wood's Law of Nuisance, 2d ed., 496.

property, that is, an unreasonable use in view of the circumstances relied upon to sustain the charge of nuisance. It has therefore been held that smoke ordinances were within the proper exercise of police power when one kind of fuel will produce a smoke less obnoxious than another kind; and it has been held the duty of manufacturers to use that kind of fuel which is least annoying. The use of a fuel which created a smoke which left a bad taste in the mouths of those breathing it, or a peculiar, pungent effect, has been held to create a nuisance.

The degree of personal discomfort required in order that a lawful business creating dust, smoke, or vapors should be declared a nuisance is one of fact under the peculiar circumstances of the case, and is not a question of law. It has been determined that there must be a sensible diminution of the comfortable enjoyment of the premises, or such a physical discomfort as to detract sensibly from the ordinary enjoyment of life. Such injuries have been held to include the discoloration of buildings or furniture, or of clothes or goods, injury and destruction to vegetation, or a deposit of cinders or chemical dust. A business that merely impairs the rental value of property or disturbs the fastidious taste or delicate sensibility of neighboring inhabitants has been held not a nuisance, nor such an injury as will warrant enjoining it.

302. Instances of Interference with Light and Air.—The smoke and soot from bituminous coal from a mill, or from a blacksmith-shop, or from a low dwelling-house; or that from a planing-mill that uses shavings, sawdust, and chips as fuel; or the smoke and acid vapors from a factory, may be injurious to the use and enjoyment of land to such a degree as to warrant the owner in having them abated as nuisances, or to entitle him to damages.

Any manufacturing plant is likely to be adjudged a nuisance as the land in its vicinity becomes occupied and is used for habitation, and especially one engaged in the manufacture of noxious or acrid chemicals, or one requiring the continuous operation of large furnaces, as iron- or glass-works, lime-, brick-, or pottery-kilns, or a power-plant.[1] It makes little difference whether the injury be due to smoke, dust, or vapors if the injury be substantial and apparent.

The injury need not be to the material substance of the land or to the vegetable growths or artificial structures which it bears; it is an invasion of the owner's rights if it deprives him of reasonably free and full enjoyment of it, considering his personal comfort and pleasure. He is not expected nor required to endure unpleasant and disturbing noises or noisome, disgusting odors or stenches. Any one who creates such things as are sensibly offensive or as produce physical discomfort is invading the landowner's rights. Such are rolling-mills, shops that work sheet metals, blacksmith and hammer shops, planing- and saw-mills and factories, the operations of which are attended with screeching, grating, rasping noises and heavy thuds; or gas-works, tanneries,

[1] 16 Amer. & Eng. Ency. Law 948, 949.

fat-rendering and soap-making establishments, glue-works, garbage-disposal plants, and many other factories that are offensive and unbearable in an inhabited community.[1]

These and a thousand others much less disagreeable may not be operated to the sensible physical discomfort of landowners in the vicinity; including such common things as slaughter-houses, pig-pens and barn-yards, livery-stables, ponds of stagnant water, etc.[2] Other instances of nuisances to property-owners are the maintenance of such an excessive heat by an adjacent owner as to render the occupation of the premises of the former uncomfortable,[3] or the keeping of fires that are threatening, or the storage of explosive and inflammable substances in such a way as to be dangerous to neighboring property.[4]

303. Public and Private Nuisances.—Such interferences with the private rights of an individual landowner should be distinguished from public or common nuisances which affect the community at large or a considerable portion of it. Interference with the individual rights of one person or a determinate number of persons is sometimes called a private nuisance and may be the ground of a civil action, while a public nuisance (nuisance proper) is the subject of an action, suit, or an indictment by the people or the state, by a public official, the attorney-general.

For an individual to maintain a suit to abate a public nuisance he must have a special interest (must have suffered some special damage) beyond that of the general public.[5] The dumping of street-cleanings by a city near plaintiff's house, so as to annoy him by the noxious and unhealthy odors and vapors arising, whereby he and his family were made sick, and his property depreciated, states a special injury.[6] The plaintiff can recover for defendant's wrongful maintenance of a nuisance irrespective of whether or not he himself maintained one on his own land.[7] If several families suffer, their actions should be *several* and not *joint*, as where different persons suffer damages from the location of a pest-house near them.[8]

Public or common nuisances are those that affect the community at large or some considerable portion of it, such as the inhabitants of a town, and the person committing such public or common nuisance is liable to criminal prosecution. A public nuisance does not always create a civil cause of action for any person, but it may do so under certain circumstances. A private nuisance affects only one person or a certain number of persons and is a ground for civil proceedings only. Generally a private nuisance affects the

[1] Board *v.* Lederer (N. J. Ch), 29 Atl. Rep. 444.
[2] 16 Amer. & Eng. Ency. Law 953–955.
[3] Grady *v.* Walsner, 46 Ala. 381; Reinhart *v.* Mantasti, 61 L. T. N. S. 328.
[4] 16 Amer. & Eng. Ency. Law 955, 956.
[5] 16 Amer. & Eng. Ency. Law 940, 941; Siskiyou Lumb. & Mer. Co. *v.* Rostel (Cal.), 53 Pac. Rep. 1118.
[6] City of New Albany *v.* Slider (Ind. App.), 52 N. E. Rep. 626 [1899].
[7] Correll *v.* City of Cedar Rapids (Iowa), 81 N. W. Rep. 724.
[8] Paducah, City of, *v.* Allen (Ky.), 49 S. W. Rep. 343.

control, use, and enjoyment of immovable property.[1] A public nuisance at common law was anything offensive to the sight, smell, or hearing, erected or carried on in a public place where people dwell or pass, or have a right to pass, to their annoyance.[2]

Whether or not certain acts or conditions are public nuisances depends frequently upon their locality. Certain acts or structures might be a public nuisance if located in public places or a thickly settled community, when they would not be so if located in remote and unfrequented places, as the outskirts of a village or city.

Thus a brew-house, a glass-house, a chandler's shop, a pigsty, are public or common nuisances when set up in such a populous neighborhood of a city that they necessarily annoy the neighborhood. A slaughter-house, a soap-works, a tallow factory, a poudrette factory, a livery stable, a tannery, a cemetery, a brick-kiln, a blacksmith-shop, a powder-house, and even a wagon-load of offensive material which emits an odor, may each become a public nuisance in a thickly settled locality.[3]

These same structures and acts may also be private nuisances, and they might be held no nuisance at all in sparsely settled localities. A tree or post on the margin of a crowded street has been held a public nuisance, although it would not be on a retired street.[4]

304. Ordinances to Prevent Smoke Nuisance.—To prevent discomforts and the disagreeable effects of smoke, many cities have passed ordinances forbidding the use of soft coal and other fuels which create dense black smoke, and the constitutionality of these ordinances has been attacked upon the ground that they discriminated between classes of persons residing within the same municipal territory.

It has been held that smoke is not a nuisance *per se* unless so declared by statute.[5] A city ordinance forbidding under penalty the emission of dense smoke from a chimney in the city, but exempting dwelling-houses and steamboats from its operation, was held valid.[6] An ordinance declaring the emission of dense smoke under certain circumstances a nuisance, and prescribing the penalty of each, and also providing that, nothing herein contained shall be construed to apply to manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby within the building where they were generated within the radius of three hundred feet therefrom, was held unconstitutional. The court said: "No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is directed against this

[1] 16 Amer. & Eng. Ency. Law 926

[2] Hackey *v.* State, 8 Ind. 494; Westcott *v.* Middleton, 43 N. J. Eq. 478.

[3] 16 Amer. & Eng. Ency. Law 927 *et seq.*

[4] Franklin Tpk. Co. *v.* Crockett (Tenn.), 2 Sneed 263; Commonwealth *v.* Reed, 34 Pa. St. 275.

[5] St. Louis *v.* Heitzeberg Packing & Provision Co., 42 S. W. Rep. 954.

[6] People *v.* Lewis, 86 Mich. 273, two justices dissenting.

nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged; whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam-power is used in manufacturing or is applied to other purposes, as a grain-elevator or hoisting apparatus in a warehouse." The court held the distinction or classification attempted to be made untenable, and that the act was therefore invalid.[1]

305. Vapors and Odors from Gas-plant.—The manufacture of gas necessarily involves the production of vapors, odors, and fluids that are offensive and injurious to health; but gas being a necessity to a community, its manufacture is not regarded as a nuisance of itself. When a gas company is authorized by charter to erect gas-works and operate them for the purpose of manufacturing gas for the public, it is responsible in damages for the ordinary and usual odors emitted if they constitute a nuisance, and the fact that the company is not negligent does not protect it from liability.[2]

That which would offend an ordinary man, and not a delicate-nosed person, has been defined as a nuisance.[3] This question must be decided by a jury, and it has been held not a question of the comparison of the condition of one property owner with that of his neighbors, but the question whether a gas company caused the said property owner actual damage. A jury should not be instructed that the owner is entitled to the same degree of comfort as that enjoyed by other persons in the neighborhood.[4]

It has been held that a landowner could not recover damages for injuries caused by the erection of a low chimney on an adjoining lot which sent smoke and cinders upon the premises and damaged the owner's well;[5] but when a gas company creates smells, smoke, and noxious odors so annoying to persons residing near the gas-works as to render his premises uncomfortable for habitation, it was held a private nuisance.[6] If, however, the buildings and processes of the company were of the best description and its servants were careful and the company exercised due care and diligence in its business, it seems that an indictment will not lie against a corporation which has been authorized by the legislature to manufacture gas to be used for lighting the streets and buildings of the city. The act of the legislature bars the people from making a public complaint by indictment so long as the gas company conducts its business with skill, care, and science.[7]

An electric-light plant will not be abated as a nuisance where it is operated in a manufacturing district, does not emit offensive smoke or

[1] State *v.* Ramsey Co. (Minn.), 51 N. W. Rep. 112 [1892].
[2] 8 Amer. & Eng. Ency. Law 1281, 1282.
[3] Bramwell, J., in Tilly *v.* Slough G. Co., 17 Gas J. 331.
[4] Columbus G. L. & C. Co. *v.* Freeland, 12 Ohio St. 392.
[5] Grange *v.* Pately Bridge G. & W. Co., 14 Gas J. 309.
[6] 8 Amer. & Eng. Ency. Law 1282 *and cases cited.*
[7] People *v.* N. Y. G. Co. (N. Y.), 64 Barb. 55.

cinders, and does no material injury to plaintiff's property, though the machinery makes a buzzing noise till a late hour of the night.[1]

306. Acts that Create Nuisances.—A village empowered to maintain and construct sewers is liable for injury resulting from noxious vapors coming upon the premises of abutting owners through its negligence in the exercise of such power.[2]

The moving of a building through, or the unloading or temporary piling of lumber in, the streets of a village or city without permission of the authorities, is a nuisance.[3] Whether or not a carriage-stone of usual size and shape and in the usual position on the street is a common nuisance is a question of law, not of fact.[4]

The fact that a building is intended to be used for a purpose which will create a nuisance is not sufficient ground for an injunction to restrain the erection thereof, unless it be alleged or proved that the building could not be devoted to other legitimate uses.[5] A grantor who has erected a structure which creates a nuisance is liable for the continuance of the nuisance when he has covenanted in the deed for quiet enjoyment and right to maintain such structure.[6]

307. Easements of Light and Air.—Easements are sometimes created which give to one person a right to have light and air come to his windows unobstructed across the land of another. In England this right may be acquired by prescription or adverse user for the full statutory period. In the United States generally this easement cannot be created by prescription, and it is inconsistent with the progress and development of a new country which is growing and changing as rapidly as is the United States. Some states hold that the easement and ancient rights cannot be prescribed for, and these are Alabama, Connecticut, Georgia, Iowa, Indiana, Maine, Maryland, Massachusetts, New York, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, and Vermont. The states holding that this easement may be prescribed for are Illinois, Louisiana, and New Jersey.[7]

Agreements reserving or creating certain rights of light and air over land will be sustained and enforced by the courts, the same as agreements and grants of other easements. A reservation in a deed of an easement to light and air from premises sold operates as a grant of a newly created easement, and the courts will enjoin the erection of a building which shall interfere substantially with light and air of the windows of the person creating the easement.[8] An intention to create an easement of light and air over a court

[1] McCann *v.* Strang (Wis.), 72 N. W. Rep. 1117 [1897].
[2] Willett *v.* St. Albans (Vt.), 38 Atl. Rep. 72 [1897].
[3] Concord *v.* Burleigh (N. H.), 36 Atl. Rep. 606; Johnson Chair Co. *v.* Agresto, 73 Ill. App. 384 [1898].
[4] Robert *v.* Powell, 52 N. Y. Supp. 918 [1898].
[5] Dalton *v.* Cleveland, etc., Ry. Co. (Ind.), 43 N. E. Rep. 130.
[6] East Jersey W. Co. *v.* Bigelow (N. J.), 38 Atl. Rep. 631 [1897].
[7] 6 Amer. & Eng. Ency. Law 152.
[8] Hagerty *v.* Lee (N. J.), 15 Atl. Rep. 399 [1888].

cannot be inferred from a reference in an administrator's deed describing the property as bounded "in part on a court called 'P. place.'"[1]

Such an agreement by a person to surrender to the adjoining owner who is contemplating the erection of a structure of all his rights to light and air over the said owner's lot is within the statute of frauds.[2] A court will take judicial notice that a brick wall built 3 feet 8 inches from certain windows and at least 15 inches above them is an obstruction of light and air.[3]

Carrying on an offensive trade for twenty years in the same place, away from buildings and public roads, does not justify a continuance thereof after the building of houses and laying out of roads, so that it becomes a nuisance.[4]

In New York state twenty years' adverse possession of part of the air, light, and access appurtenant to a city lot by means of the maintenance of an elevated road in the street in front of such lot is sufficient to give title to such easements by prescription even though the possession is based on no actual adverse title.[5]

Where the basement of a building is lighted from above by a floor-light, the right to the light from such source is an easement which passes with a lease of the basement, in the absence of a restriction in the lease, and the tenant of the room above will be enjoined from covering the floor.[6]

The right to discharge smoke and soot on the premises of another is an easement, within Code, § 2031, providing that, in suits in which title to an easement in land is claimed through adverse possession, the use of the same shall not be admitted as evidence that the party claimed the easement as his right.[7]

308. Interference of Air and Light by Boundary Walls and Overhanging Structures.*—In New York state a person may erect a structure on his own lot for the purpose of preventing a view of his premises by a neighbor even though it obstruct the light of the neighbor's windows.[8] He may erect a screen or fence upon a party-wall dividing two buildings; but he is under no obligation to fence the top of the party-walls so as to protect persons who may be on the roof of adjoining buildings from falling over into his yard. There is no exception to this principle in favor of firemen using the roof of the adjoining building in the performance of their duties.[9]

An injunction restraining a person from erecting any building so near as

[1] Baker *v.* Willard (Mass.), 50 N. E. Rep. 620 [1898].
[2] Ware *v.* Chew (N. J.), 1 Atl. Rep. 746 [1888].
[3] Ware *v.* Chew (N. J.), 1 Atl. Rep. 746 [1888].
[4] Board *v.* Lederer (N. J. Ch.), 29 Atl. Rep. 444.
[5] American Bank-Note Co. *v.* New York El. R. Co. (N. Y. App.), 29 N. E. Rep. 302; Broiestedt *v.* Railroad Co., 55 N. Y. 220, *distinguished*, and 13 N. Y. Supp. 626, *modified*.
[6] O'Neill *v.* Breese (Super. Ct.), 23 N. Y. Supp. 526. *See* Greer *v.* Van Meter (N. J. Ch.), 33 Atl. Rep. 794.
[7] Churchill *v.* Burlington Water Co. (Iowa), 62 N. W. Rep. 646.
[8] Levy *v.* Samuel (Super. Ct.), 23 N. Y. Supp. 825.
[9] Woods *v.* Miller, 52 N. Y. Supp. 217.

* *See* Sec. 341, *infra*.

to exclude the light from plaintiff's house is not sufficiently defined, it not appearing whether a building would be permissible under any circumstances, and, if so, how near.[1] An action may not be had for the removal of such a structure as a bay-window, because such windows extend into the street and obstruct the view, where it does not appear that there is any serious interference with light, air, or access.[2]

The construction of a building, so that part of it overhangs a street in a town in such a manner that a neighbor's property is rendered more liable to fire than before, thereby increasing the cost of insurance and depreciating the market value of the property, ordinarily gives no right of action to the party aggrieved.[3]

Although private persons may not enjoin projections into the street, they may prevent buildings from being built which overhang the boundary of their respective lots, or recover substantial damages for the trespass. If they have stood by and seen the building erected without notice and protest, they may be denied a writ of mandamus requiring that the encroaching wall or projecting roof be taken down, but damages will be awarded to compensate the owner for the injury done to his land.[4]

This subject is, however, so closely allied to the chapter following that it will be further treated therein, to which the reader is directed.*

[1] Robinson *v.* Clapp, 65 Conn. 365.
[2] Wormser *v.* Brown (Sup.), 25 N. Y. Supp. 553. *But see* Hess *v.* Lancaster (Com. Pl.), 4 Pa. Dist. Rep. 737.
[3] Siskiyou Lumber & Mercantile Co. *v.* Rostel (Cal.), 53 Pac. Rep. 1118 [1898]. *Contra*, People *ex rel.* Ackerman *v.* True, N. Y. Sup. Ct., June 1900.
[4] Crocker *v.* Manhattan L. Ins. Co., N. Y. Sup. Ct., June 1900.

* *See* Sec. 366, *infra*.

CHAPTER XVIII.

PROPERTY RIGHTS DEFINED BY BOUNDARY LINES. LATERAL SUPPORT.

311. Rights of Adjoining or Contiguous Owners.—Considerable space has been heretofore given to the rights of riparian owners, and more space will be given hereafter to the boundary-lines of contiguous or adjoining owners and to the determination and location of such boundary-lines. Before taking up the determination and location of such lines it is desirable to understand the property rights of adjoining owners upon such a boundary-line. Many of these things will be discussed as directly incident to the determination of the boundary-line, but there are some rights which will not be presented and which are best treated here.

The boundary-line between two adjoining property owners is frequently defined by barriers which are employed not only to designate the line of separation between two estates, but also to prevent encroachments and trespass, by keeping people or animals out of, or off from, the land of the owner. Such obstructions are usually in the form of fences, walls, or hedges, and may be erected or planted upon the line or at the uttermost limit of the dividing-line. When walls, fences, and ditches are built equally upon both sides of the dividing-line they are usually held to belong to the two adjoining landowners, each owning an undivided interest in the structure.[1] By statute it is sometimes provided that the structure or fence may be divided by fence-viewers or commissioners, so that each party shall own and control the whole of a certain length or a definite part of the structure, but in the absence of such statute or any express agreement the two adjoining landowners are joint owners in the said fence or structure.

312. Trees and Shrubs on Boundary Line—Line-trees.—In the country it is often the practice to plant hedges or trees directly upon the dividing-line between estates, and where tracts of forests are subdivided by real or imaginary boundary-lines it often happens that trees will stand upon the line, and in such cases they are called "line-trees." The line-tree, it seems, need not center upon the boundary-line. It is a line-tree if the line passes through

[1] Burrell *v.* Burrell, 11 Mass. 294; Rawson *v.* Ward, 128 Mass. 552. Stoner *v.* Hunsicker, 47 Pa. St. 514;

such a part of the stump of the tree as to lead to the presumption that the tree was started on the line.

The ownership of a tree whose trunk is cut by the dividing-line of two estates should be determined by deciding the question, "Upon whose land did the tree start to grow?" If the tree started upon the land of A and has increased in size until the trunk has encroached upon the land of B, his neighbor, it is submitted that it should always belong to A, who owned the treet when it started, the same as do the overhanging branches. It makes a difference whether the tree grows to the line or the line comes to the tree. Trees that stand upon the line as it is run (surveyed) are usually described as monuments or landmarks, in which case neither party can cut them down. They then become line-trees strictly, and the parties are either tenants in common or each is the owner of an undivided half.

When trees are planted upon, or near to, the dividing-line of two estates they must necessarily penetrate the soil of the adjoining owner and overhang his land. The roots must therefore take nourishment from the soil, and the branches and leaves shut out the sunlight from that part of the estate which they overhang. If the tree bear fruit, the question arises as to whom that fruit belongs and who may gather it. In the case of a "line-tree," it is pretty well settled, not only in the United States, but in England, and by the civil law, that the two adjoining owners are joint owners of the tree and therefore of the fruit. They are the common property of both.[1]

313. Ownership of Trees Growing Near Boundary-line.—The earlier cases held that when a tree growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the land of another, they thereby become tenants in common of the tree. An early Connecticut case questioned such a doctrine,[2] because there were insurmountable difficulties when the principle was reduced to practice. That case held that it was not a question whether the branches and roots do or do not overhang and penetrate the land of the adjoining owner; that it was the fact alone which creates a tenancy-in-common; that if such tenancy-in-common existed, it was diffused over the whole tree, and that each owned a proportionate share of the whole. The question was, in what proportion did the parties hold, and how were the shares to be determined? What part of its nourishment did the tree derive from the soil of the adjoining proprietor? On what principle was the account to be settled between the parties? If the line should run through a forest or grove, what rule was to apply to those trees growing so near the line as to extend some portion of their roots across it? How would a man know whether he was the exclusive owner of trees growing entirely on his land, but near the line? And how would he know whether he could safely cut them without subjecting himself to an action?

[1] Quillan *v.* Betts (Del.), 39 Atl. Rep. 595; Hunt *v.* Taylor, 22 Vt. 556; Carroll *v.* Smith (Md.), 4 Har. & J. 128; Dubois *v.* Beaver, 25 N. Y. 123.

[2] Lyman *v.* Hale, 11 Conn. 177, 182.

Such a doctrine has long since been overthrown, and it is well settled now that a tree is wholly the property of him upon whose land the trunk stands.[1] It also seems to be well settled that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts or destroys it without the consent of the other.[2]

314. Liability for Destruction of Line-trees.—While the liability of an owner who has destroyed a line-tree is universally recognized, yet it is not well settled that the two adjoining owners are tenants in common. The courts frequently evade the question by holding that it is not necessary to determine the matter.[3] The essence of a tenancy-in-common is a joint interest in each and every part of the property, and it is pretty well understood that this principle does not apply to artificial objects placed upon a boundary-line by the hand of man, such as a wall, a fence, or a building. In regard to natural objects, as trees, it might be inconvenient for the parties to avail themselves of their property unless they were regarded as tenants-in-common. One might desire his part of the timber of the trees, while the other preferred that they should remain standing. If the ownership be a tenancy-in-common, the remedy is clear; a partition or sale of the trees might be ordered. In the country or on a suburban place the destruction or maintenance of the trees presents a different problem from what is presented in the city, where every available foot, or inch even, of ground is required for improvement. If the property in line-trees be not regarded as a tenancy-in-common, the remedy is not clear, and in cases where the boundary-line runs through a forest it is more convenient to hold the parties to be tenants-in-common. Whichever rule is held, a remedy exists where the trees are destroyed by either one of the parties; but if the trees are destroyed by outside trespassers and one only of the adjoining owners wishes to withdraw his interest in the property, the rule applied makes a difference.[4]

Either of the owners of adjoining lots may lop off the branches or roots extending from the trunk of such line-tree over or into his land.[5] Where the restraining of a person from removing a part of the trunk of the tree upon his own land would deprive him of the opportunity to build as he desired, and would produce a greater irreparable injury than would be produced by the removal of such part and the destruction of the life of the tree, an injunction will be refused and the parties left to settle their rights in an action at law. A person cannot prevent his neighbor from building to the dividing-line of adjoining lots, though such building interfere with a trunk of the tree and the

[1] Lyman *v.* Hale, 11 Conn. 177; Skinner *v.* Wilder, 38 Vt. Rep. 115; Dubois *v.* Beaver, 25 N. Y. 123; Hoffman *v.* Armstrong, 46 Barb. 337.

[2] Griffin *v.* Bixby, 12 N. H. 454; Hoffman *v.* Armstrong, 46 Barb. 337.

[3] Relyea *v.* Bacon, 34 Barb. 547; Dubois *v.* Beaver, 25 N. Y. 123.

[4] *See* Tyler on Boundaries 324.

[5] Robinson *v.* Clapp, 65 Conn. 365; Grandona *v.* Loodal, 70 Cal. 161.

free access of light and air to the windows of plaintiff's house, nor is it material that he has offered to buy the land and to pay therefor the sum at which it should be appraised by persons to be selected by the parties.[1]

315. Property in Overhanging Fruit of Trees.—When a trunk of a tree stands wholly upon the land of one owner the tree belongs exclusively to him even though the roots grow into, and the branches overhang, the land of his neighbor. The title to the property is well settled, and the rights of the two neighbors to appropriate the fruit of such trees or to remove any part of such trees is equally well settled. The fruit of a tree is as much a part of a tree as are the leaves and branches, and it is therefore held that the fruit of a tree belongs to the party on whose land the trunk or stump stands.[2]

An adjoining owner will be liable in trespass for gathering the fruit which overhangs his land, or for preventing the owner of the tree from gathering it, provided the latter can do so without committing a trespass. If the owner uses force to prevent the owner of the tree from gathering the fruit which overhangs his land, he may be held liable in damages for any harm done, as for assault and battery.[3]

Whether or not the owner of the tree can pick the fruit from the overhanging branches is a question about which there is a difference of opinion. Technically it is an invasion of the adjoining owner's rights, but by allowing the branches and the fruit to remain overhanging his land the latter may be held to have waived his technical rights. The early English cases held that the owner of the fruit might go and take it if he made no longer stay than was convenient and did no apparent damage.[4] The same rule was applied as where a tree is blown down by the wind. The owner may not enter without such special circumstances to justify it, and should not enter without previous request to the one in possession of the land upon which the fruit or tree has fallen.[5]

316. Lopping or Cutting Overhanging Branches.—Although such is the law, it does not follow that the owner of land is obliged to have it burdened by the overhanging branches or the penetrating roots of his neighbor's trees. If they prove to be a nuisance, he may have an action for damages and it may be abated.[6] The owner of the adjoining land whose lot is overhung by the branches may lop off or clip the limbs and branches that so overhang to the extent that they overhang and no more;[7] and he may cut the roots that penetrate his soil, if they cause damage[8] or are a nuisance.[9] After lopping or

[1] Robinson *v.* Clapp, 67 Conn. 538. *See also* Relyea *v.* Beaver (N.Y.), 34 Barb. 547.

[2] Lyman *v.* Hale, 11 Conn. 177; Skinner *v.* Wilder, 38 Vt. 115; Hoffman *v.* Armstrong, 48 N. Y. 201.

[3] Hoffman *v.* Armstrong, 46 Barb. 337, 48 N. Y. 201.

[4] Viner's Abridgment, tit. Trespass; Miller *v.* Fawdrye, Popham 163; Latch. 120; Smith *v.* Kinrick, 7 Com. Bench 515.

[5] Anthoney *v.* Haney, 8 Bing. 186; Newkirk *v.* Sabler (N. Y.), 9 Barb. 655.

[6] Aiken *v.* Ketchum, 39 Barb. 400.

[7] Grandona *v.* Loodal, 70 Cal. 112.

[8] Lonsdale *v.* Nelson, 2 B. & C. 302.

[9] Tissot *v.* Gt. So. Tel. Co., 39 La. Ann. 996.

trimming off such limbs and branches it seems that he may not carry them, and the fruit they bear, away and convert them to his own use;[1] and if the owner prune his trees, he cannot enter and take away the limbs that fall upon the adjoining land if by using due care their falling might have been prevented. He should plead that he did his best to hinder them from falling.[2]

Whatever unlawfully annoys or injures another may be abated, taken away, or removed by the party injured so long as he commits no riot in doing so. If the branches of a neighbor's trees spread over his land, they may be cut down. They may not be cut in anticipation that they will eventually become a nuisance. The same doctrine applies to roots penetrating neighboring soil. A Virginia creeper which extends itself over the side of a house gives the owner a right to cut it down and clear it from his house as a nuisance. He should use no greater force and violence, and do no greater damage, than is necessary.[3] In abating a nuisance such as arises from overhanging branches care must be taken to cut off only so much as actually overhangs the land of the party injured.

The permitting of branches to overgrow and overhang a neighbor's land, or the roots to penetrate his soil, is an unequivocal act of negligence, and is a nuisance to the servient estate. It is a nuisance from omission, in distinction from a nuisance by an act of commission. The latter class of nuisances, which are committed in defiance of the person injured, may be abated by the party himself without notice to the person committing them; but in nuisances from omission the party who permits their existence should be given notice of them, that he may have an opportunity to remove the cause himself before another intrudes upon his land to abate it. To justify an entry upon the land of another in such a case notice should be given of the nuisance and a demand that it be abated. The security of lives or the protection of property might sometimes require prompt and immediate action that would excuse a trespass, and that would not allow time to call upon the property owner to remedy it. In such a case the abatement of a nuisance from omission would be justified. In all cases of private nuisance, so called, the injured person may proceed by a suit to have it abated.[4]

Some of the cases hold that to give a person the right to abate a private nuisance he must have suffered injuries to such an extent as to give him a right of action. If he attempts to abate it, he acts at his peril, and to justify his act the thing must be a nuisance, and not merely an apprehended nuisance. He must not go beyond what is necessary to protect his rights.[5]

317. Actions for Injuries from Overhanging Trees.—To recover in an action against an adjoining owner who allows the limbs of his trees to over-

[1] Skinner *v.* Wilder, 38 Vt. 115.
[2] Lambert *v.* Dessey, Ld. Raym. 422, 467.
[3] Tyler on Boundaries 326, 237.
[4] Tyler on Boundaries 327, 328; 3 Blackstone's Comm. 5; 16 Amer. & Eng. Ency. Law 989, 990.
[5] 16 Amer. & Eng. Ency. Law 989.

hang one's lands there must be some real sensible damage shown, as where the tree is noxious or poisonous in its nature.[1] The fact that berry-bushes are shaded and bear less fruit than others that are more exposed will, it seems, not be sufficient injury to sustain an action. The remedy of the injured party is to lop the branches.[2]

318. Trees that Overhang a Public Way.—If a landowner permit his trees to overhang a highway so as to inconvenience the public, it is a common nuisance and the branches may be lopped off so that they shall not annoy passers-by. Any one may justify the removal of such a common nuisance, because injuries of this kind, which obstruct and annoy the public and as interrupt daily convenience and use, require an immediate remedy and cannot wait for the slow machinery of the courts.[3] However, a contractor who has undertaken a public improvement, such as stringing a fire-alarm telegraph for a municipal corporation, has no right to invade the premises of an abutting owner and cut off limbs that overhang the sidewalk and which did not obstruct the use of the sidewalk, and when the posts and wire could have been located elsewhere.[4]

319. Trees Growing in Public Ways.—As hereinafter explained,* the title to the soil of a public way is usually in the abutting owner, and he is entitled to the grass, timber, etc., that may grow upon its surface.[5] He may plant shade-trees in the highway if the public uses are not interfered with or the way obstructed. If any person unnecessarily or without authority interferes with them or destroys them, such person will be liable to the abutting owner in trespass.[6] He may be restrained by injunction from removing them. The fact that it will cost less to build a bridge upon one side of a street is not sufficient reason to warrant a road commissioner building it there when it will destroy the abutting owner's hedge and trees. Such an act may be enjoined.[7] The right of public officers to trim, remove, or destroy shade-trees on highways against the will of the abutting owner depends upon the necessity, which is a question for the jury.[8] Such removal must be demanded by the wants of the public travel and convenience, the determination of which may be reviewed and controlled by the court.[9] A railroad company, however,

[1] Crowhurst *v.* Amersham Burial Bd., 4 Exch. Div. 5. *But see* Wilson *v.* Newberry, L. R. 7 Q. B. 31.

[2] Countryman *v.* Lighthill (N. Y.), 24 Hun 405.

[3] In England this rule has not been followed in cases where a fence belonging to a railway company obstructed a thoroughfare. It was held, there, that the public had no right to demolish it, but that a mandamus might be applied for, or some other remedy sought. Wyatt *v.* Gt. W. Ry., 6 Best & Smith 709; Ellis *v.* Lond. & S. W. Ry. Co., 2 Hurlst. & Norm. 424.

[4] Tissot *v.* Gt. So. Tel. Co., 39 La. Ann. 996; Hodgins *v.* Toronto, 19 Ont. App. 537.

[5] 26 Amer. & Eng. Ency. Law 560.

[6] Clark *v.* Dasso, 34 Mich. 86; Graves *v.* Shattuck, 35 N. H. 257; Weller *v.* McCormick, 52 N. J. Law 470; People's Ice Co. *v.* Steamer Excelsior, 44 Mich. 233.

[7] Quinton *v.* Burton, 61 Iowa 471; Crimson *v.* Deck, 84 Iowa 344.

[8] Winter *v.* Peterson, 24 N. J. Law 524.

[9] Bills *v.* Belknap, 36 Iowa 583. *But see* Chase *v.* Oshkosh, 81 Wis. 313.

* *See* Secs. 441–446, *infra.*

was held to be the sole judge of the necessity of removing ornamental trees from its right of way.[1] If the title to the street be in the city, trees growing in front of a lot may be removed by the municipal authorities[2] without being liable to an action. Such trees may be removed in order to grade the street;[3] and the city may grant a telephone company a license to clip the branches without giving the abutting owner a cause for complaint.[4] Laws passed for the protection of shade-trees in the street and prohibiting their mutilation or removal have been held not to include the owner.[5]

320. Measure of Damages for Destruction of Trees. — A landowner may obtain damages for the destruction of his trees, and the measure of such damages is usually the value of the trees. If the trees are specially valuable to an estate, as ornamental, shade, growing, or fruit trees, then the measure of damages is the amount that the value of the land has been diminished. If the land is also injured, such injury may also be considered.

It does not matter how the trees are destroyed, whether by chopping and sawing, or by fire, or by drainage, or by chemical dust and vapors, or by oil and gas negligently allowed to permeate the soil.[6] The measure of damages is not the cost of replacing the trees, and the care and labor bestowed on the trees destroyed;[7] nor is it the value of the trees for transplanting, as shade and ornamental trees,[8] but the value of the destroyed trees to the owner of the land at the date of their destruction.[9] In cases where timber trees have been cut from forests the measure of damages is usually the value of the trees taken or destroyed, and nothing more. This is so held for the reason that the realty is not damaged, but it may be a benefit to the land to have trees that have reached maturity cut to make room for the younger growth.[10]

To recover full damages for the trees cut and any injury that the land has suffered the action should be for trespass *quære clausum*. In an action for trover, recovery will be limited to the value of the trees. Replevin may also be maintained for trees severed from the land, and the landowner's right to pursue his property is unaffected by any change made in its shape or form if it can be identified. If the trees were cut willfully and wantonly no allowance will be made for the increased value of the timber, which resulted from the time, labor, and skill bestowed upon it.[11]

[1] Brainard *v.* Clapp (Mass.), 10 Cush. 6.
[2] Gaylord *v.* King, 142 Mass. 495.
[3] Castleberry *v.* Atlanta, 74 Ga. 164.
[4] Hodgins *v.* Toronto, 19 Ont. App. 537. *But see* Clay *v.* Postal Tel. Co., 70 Miss. 406; Hoyt *v.* So. N. E. Teleph. Co., 60 Conn. 385.
[5] Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136. *But see contra* in Baker *v.* Normal, 81 Ill. 108, an ordinance prohibiting the hitching of horses to shade-trees.
[6] 26 Amer. & Eng. Ency. Law 563–567.
[7] Stoner *v.* Texas, etc., R. Co., 45 La. Ann. 115; Whitbeck *v.* N. Y. Cent. R. Co., 36 Barb. (N. Y.) 644.
[8] Fremont, etc., R. Co. *v.* Crum, 30 Neb. 70.
[9] Mitchell *v.* Bellingsley, 17 Ala. 391.
[10] *See* 26 Amer. & Eng. Ency. Law 564.
[11] Heard *v.* James, 49 Miss. 236; Single *v.* Schneider, 24 Wis. 299; Hungerford *v.* Redford, 29 Wis. 345; Herdic *v.* Young, 35 Pa. St. 176.

321. Rights of Landowner to Lateral Support for his Land by the Land of his Neighbor.—At common law every person in making earthworks on, or in, his own land, whether by surface excavations or underground pits, is bound so to work as not to cause any subsidence of the original soil of his neighbor. In other words, every man is entitled to have his land in its natural state supported by the adjoining land of his neighbor. It is not a question whether the workings are skillfully or unskillfully conducted; the right to support for the soil itself is an absolute right which the adjoining owner is not entitled to infringe, whether by skillful workings or otherwise.[1]

The fact that the land of two neighbors is higher than the adjoining street will not justify either in removing the support of the other even though it is made for the purpose of bringing the land to the level of the street.[2] Even when adjoining lands are upon a slope or hillside, the higher land is still entitled to the support of the lower. The lower owner may not excavate so near to the boundary-line as when two lots are at the same grade.[3]

Therefore when it was alleged that defendant was possessed of a certain sewer which discharged into and caused to be deposited in the river sewage which it became the city's duty to remove, to prevent it from interfering with navigation, and that, in order to avoid the expense of frequent removals, and to provide a basin in which the same might settle, the defendant city negligently dug in and excavated the river-bed around and near the foundations of plaintiff's building in such manner as to deprive the land of plaintiff of its natural support, and to cause it to move outward into the excavation made, carrying with it the piles sunk therein, and causing them to incline and bulge outward, it was held that a good cause of action was stated.[4]

322. Landowner may Make Improvements—Owner must Give Notice.—The common law guarantees to adjoiners the lateral and subjacent support which his land receives from the adjoining land, but this right is subject to the right of the adjoining owner to make excavations for construction if he use ordinary care to sustain the land of the other and give reasonable previous notice of his intention.[5] One who undertakes improvements on his land which endanger the structures on his neighbor's land is bound to give notice of the intended improvements, and to use ordinary care and skill in making them.[6]

California, Idaho, Montana, North Dakota, Oklahoma, and South Dakota have statutes which provide that each coterminous owner is entitled to the

[1] Schultz *v.* Bower (Minn.), 59 N. W. Rep. 631; Stimmel *v.* Brown (Del.). 7 Houst. 219; *accord*, Spohn *v.* Dives (Pa. Sup.), 34 Atl. Rep. 192; Farrand *v.* Marshall, 21 Barb. 409, *reviewing many cases;* Bohrer *v.* Dienhart H. Co. (Ind. App.), 45 N. E. Rep. 668; Bouquois *v.* Monteleone (La.), 17 So. Rep. 305.

[2] Stimmel *v.* Brown, 7 Houst. 219.

[3] Weir *v.* Bell's App., 81 Pa. St. 203.

[4] Pomroy *v.* Granger (R. I.), 29 Atl. Rep. 690.

[5] Sullivan *v.* Zeiner (Cal.). 33 Pac. Rep. 209; Washburn on Easements 453; Massey *v.* Goyder, 4 C. & P. 161.

[6] Lasala *v.* Holbrook (N. Y.). 4 Paige 169; *English Cases* in 12 Amer. & Eng. Ency. Law 938.

lateral and subjacent support which his land received from the adjoining land, subject to the right of the owner of the adjoining land to make proper and useful excavations for the purposes of construction by using ordinary care and skill and taking reasonable precautions to sustain the land of the other, and by giving previous reasonable notice of intention to make excavation.

In South Dakota, where the statute laws require an adjoining owner to give previous reasonable notice of his intention to make excavations on his land, it has been held that if the adjoining owner had actual knowledge of the intention of his neighbor to make an excavation on his land in time to allow him to protect his property, such knowledge dispensed with a formal notice. The question might arise whether or not an application and issuing of a license to build would be such actual notice or knowledge.[1]

The rule that a person excavating with due care on his own soil will not be liable for injuries thereby occasioned to an adjoining owner has no application to a case where the excavation is effected by blasting out rock with an explosive so powerful as to break the windows, loosen the walls, and injure the furniture of adjoining owners by atmospheric concussion.[2]

323. Landowner is Entitled to Support of Land Alone.—A landowner is entitled to lateral support from a lot of an adjoining owner only for the soil of his lot in a natural state, and not for a building placed on the land.[3] Such right to lateral support does not extend to the support of any additional weight or structures.[4]

A landowner can require his neighbor to furnish only so much lateral support as is requisite to sustain the land in its natural undisturbed state. If an adjoining owner excavates nearer the boundary than such a limit, he is bound to furnish support to the land by artificial means, as by a retaining wall. If such support is furnished, the excavation may be made up to the dividing-line. The artificial support is then substituted for the natural support of the soil, and it may be of any material provided it be sufficient for the purpose and it is continued so as to maintain the land in its proper position.[5] It is not sufficient to escape liability for an injury caused by insufficient support to show that the support furnished was reasonable or customary, or that the excavations were made with care and skill. A support must prove sufficient and effectual.[6]

"If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support or otherwise over the land

[1] Novotny *v.* Danforth (S. D.), 68 N. W. Rep. 749.

[2] Morgan *v.* Bowes (Sup.), 17 N. Y. Supp. 22.

[3] Obert *v.* Dunn (Mo.), 41 S. W. Rep. 901.

[4] Sullivan *v.* Zeiner (Cal.), 33 Pac. Rep. 209; Thurston *v.* Hancock, 12 Mass. 221; Lasala *v.* Holbrook (N. Y.), 4 Paige 169; Ferrand *v.* Marshall 21 Barb. (N. Y.) 409; Novotny *v.* Danforth (S. D.), 68 N. W. Rep. 749; Bohrer *v.* Dienhart H. Co. (Ind. App.), 45 N. E. Rep. 668; Goddard on Easements 31; Panton *v.* Holland, 17 Johns. 92; Humphrey *v.* Boyden, 12 Q. B. 139.

[5] Snarr *v.* Granite C. & S. Co., 1 Ont. 102; Weir *v.* Bell's App., 81 Pa. St. 203.

[6] Jones on Easements, § 591.

of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect."

One who erects a building on the line of his own land is himself in fault if he has increased the lateral pressure so as to prevent the adjoining owner from excavating upon his own land. "A man who builds a house adjoining his neighbor's land should foresee the probable use of the adjoining land, and by convention with his neighbor, or by a different arrangement of his house, secure himself against further interruption and inconvenience."

An injury done to a building by reason of an excavation upon the adjoining land made with proper care and skill is *damnum absque injuria.* "While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor by an interference with this natural right. If a man is not content to enlarge his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right." [1]

When, in bringing a street to grade by filling, the land of the abutting owner is encumbered by the embankments so that the fences and trees are destroyed, the owner may recover damages from the city unless the filling was made by the owner's consent, in which case nothing can be recovered on that account.[2]

324. Statutory Laws in Large Cities.—In the cities of New York and Brooklyn (Greater New York) the common-law rule of lateral support has been modified. In 1855 the legislature of the state of New York interposed to regulate the exercise, by owners of land, of the right of excavation, and to afford to owners of buildings a new protection against injuries from excavations on adjoining land. By this act (Chap. 6, Laws 1855) it is declared that whenever excavations on any lot in New York or Brooklyn "shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall wholly or partly on adjoining land, and standing upon or near the boundary-lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall, at all times from the commencement until the completion of such excavation, at his own expense preserve the wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavation was commenced."

Under this act it has been held that in order to subject the person making

[1] Jones on Easements, § 604.

[2] Ludlow *v.* Troste (Ky.), 45 S. W. Rep. 661 [1898].

the excavation to the expense of protecting the adjoining wall, he must be afforded the necessary license to enter the land; that the license must be explicit and sufficient to protect him, and it should be given by all persons who would be injuriously affected by such acts.[1] The act, however, does not require the owner of the adjoining land to tender a license in order to receive the benefit of the statute, but it requires the party causing such excavation to be made to request permission to enter and proceed with the excavation without injuring the wall. If he fails so to do, he is liable for the damages.[2] The adjoining owner is only required to grant such license to enter his premises when requested.[3]

Practically the same law was embodied in the Consolidation Act, Laws 1882, chap. 410, sec. 474, amended by Laws 1887, chap. 566, sec. 3, which provide that where an excavation on any land is to be made to the depth of more than ten feet below the curb, and there shall be any wall on adjoining land and standing near the boundary, the person making such excavation "if afforded the necessary license to enter on the adjoining land, and not otherwise," shall preserve such wall from injury. In an action for damages resulting from a violation of this section, the court refused to instruct that "if there were any defects in plaintiff's building before defendant began to build, and that while defendants were endeavoring to support this building these defects became enlarged and defendants were not guilty of negligence, plaintiff cannot recover."[3]

This law does not apply to one excavating in a street of New York City under a contract with the municipal authorities.[4]

After the license to enter and make excavation has been granted and the adjoining owner has excavated below the old wall and has inserted needle-beams to sustain it, his right to proceed to build a new wall to the extent that the old wall had been shored up may not be denied by revoking the license to enter and protect the wall. The adjoining owner may enter upon so much of the adjoining lands as is necessary before he can be required to remove the needle-beams from the premises. Whether or not he has the right to proceed and shore up other portions of the adjoining building after his license to enter has been revoked is a question.[5]

Under the New York statute law it has been held that the duty to preserve the wall of the adjoiner's building from injury does not cease with the completion of the excavation. It is necessary so to support the wall that it will remain as stable as before.[6] A jury is justified in concluding that there

[1] Sherwood *v.* Seaman (N. Y.), 2 Bosw. 127 [1857].

[2] Dorrity *v.* Repp, 72 N. Y. 307, *reversing* 11 Hun 374.

[3] Cohen *v.* Simmons (Sup.), 21 N. Y. Supp. 385.

[4] Jenks *v.* Kenny (Super.), 19 N. Y. Supp. 243, 28 Abb. N. C. 154. See this case, *note* on duty to protect adjacent wall, and an amendment of statute N. Y. Consolidation Act, § 473, Laws 1892, ch. 275, p. 543.

[5] Ketchum *v.* Newman, 116 N. Y. 422.

[6] Bernheimer *v.* Kilpatrick, 6 N. Y. St. Rep. 858.

was direct connection between the injuries to a wall and the act of excavation where the evidence shows that the wall had stood a number of years without settling, and that when a deep excavation was made beside it cracks appeared in the wall and it settled perceptibly toward the excavation.[1]

The common-law doctrine of lateral support has been abrogated in Ohio by Ohio Rev. Stat., sec. 2677, as amended May 9, 1894.[2] The depth to which an owner may excavate without liability for damages to an adjoining owner, under the Ohio statute allowing twelve feet of excavation, is determined, in the case of lots extending from a higher to a lower street, by measuring from the middle of a slanting line drawn from the curb of the higher to the curb of the lower street.[3] A wall built along the side of a lot by its owner to protect it against an adjoining lot lying higher, when located entirely on the lower lot and away from the boundary-line thereof, may be torn down by its owner and the earth between the wall and the higher lot removed by him.[4]

325. Easement of Extra Support—How Acquired.—If any structure or extra burden is placed upon the soil, the right of support must be acquired as in other easements. This right may be acquired by grant, express or implied, but it is doubtful if it may be acquired by prescription. All the different methods of obtaining additional support are reducible to one, that by grant, which may be express, implied, or presumed. When the owner of land acquires by grant an easement of support, in addition to that to which the soil is subject by nature, as when it is enlarged by the additional burden of buildings erected upon the land, if the owner has enjoyed the support of the buildings or additional burdens for twenty years, and both parties had knowledge of that support, it is sometimes held that the owner acquires a right to it as an easement, and that the adjoining owner cannot withdraw the support of the structure without being liable in damages for injuries that accrue. In such a case the grant must be a presumed grant. In the absence of express stipulations the grant is implied. Rights of support in such cases are held to have been mutually granted and reserved from the original owner and first grantee, and the second grantee succeeds to such owner's reserved rights.

"It is assumed as settled that where two or more houses, so constructed as to require mutual support, are conveyed to different owners, or where separate portions of one dwelling become vested in different owners, right of support as incident to the property passes by the conveyance to each grantee unless excluded by the terms of the grant. Easements of this description are acquired by grant, but in considering the conveyance it is to be presumed

[1] Bernheimer *v.* Kilpatrick, 6 N. Y. St. Rep. 858; 12 Amer. & Eng. Ency. Law 939, *and cases cited.*

[2] Hall *v.* Kleeman (C. P.), 4 Ohio N. P. 201, 6 Ohio Dec. 323.

[3] Elshoff *v.* Deremo (C. P.), 3 Ohio N. P. 273.

[4] Kilgour *v.* Wolf (C. P.), 4 Ohio N. P. 183, 6 Ohio Dec. 343.

that the parties intended to preserve the obviously existing relations and dependencies of an estate, and all those instances necessary to the present enjoyment of the thing granted are held to pass. There is an obligation upon each adjacent proprietor in favor of the other beyond what is implied in the maxim which requires every one to use his own so as not to injure his neighbor. The exclusive dominion of each is so far qualified that neither can take away the support of the other, however prudent and careful on his part the act may be." [1]

An easement for the support of a building can only be acquired by an express or implied grant or covenant. "If, at the time of the severance of the land from that of the adjoining proprietor, it was not in its original state, but had buildings standing on it up to the dividing-line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural conditions. It is, of course, incumbent upon the party who claims the right of support for buildings to prove the contract or grant by which such right was acquired. The presumption is against any right of support for buildings or other structures upon the land." [2]

"A grant made expressly for the purpose of building a house creates a legal easement over the adjoining land retained by the grantor coextensive with the known uses of the grant; and the circumstances that the grant does not notice the intention of building is immaterial in a case where both grantor and grantee are aware of it, affecting at most the grantee's remedy, not his right, relative to such an easement." [3]

326. Easement to Extra Support Acquired by Prescription.—It has frequently been held that "a right to lateral support by adjoining land may be acquired by twenty years' uninterrupted enjoyment, for a building proved to have been newly built or altered so as to increase the lateral pressure, at the beginning of that time, and it is so acquired if the enjoyment is peaceable and without deception in concealment, and so open that it must be known that some support is being enjoyed by the building." [4]

[1] Stevenson *v.* Wallace, 27 Gratt. (Va.) 77; Pierce *v.* Dyer, 109 Mass. 374. *See also* Story *v.* Odin, 12 Mass. 157; Casselbery *v.* Ames, 13 Mo. App. 575; Charless *v.* Rankin, 22 Mo. 566; McGuire *v.* Grant, 1 Dutch. (N. J.) 356, Eno *v.* Del Vecchio, 4 Duer (N. Y.) 53; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169; Kieffer *v.* Imhof, 26 Pa. St. 438; City of Quincy *v.* Jones, 76 Ill. 231; United States *v.* Appleton, 1 Sumn. (U. S.) 492.

[2] Jones on Easements, § 605.

[3] Robinson *v.* Grave, 27 L. T. 248, *affirming* 29 L. T. 7. *See also* Rigby *v.* Bennett, 21 Ch. D. 559; s. c., 40 L. T. 47; Murchie *v.* Black, 19 C. B. (N. S.) 190; Caledonian R. Co. *v.* Sprot, 2 Macq. H. L. Cas. 479; Palmer *v.* Fleshees, 1 Sid. 167; Cox *v.* Matthews, 1 Vent. 237; Brown *v.* Windsor, 1 Crompt. & J. 20.

[4] Dalton *v.* Angus, 6 App. Cas. (Eng.) 740, *reversing* 3 Q. B. D. 85; Hunt *v.* Peake, 1 Johns. (Eng.) 705; s. c., 29 L. J. Ch. 785; Partridge *v.* Scott (Eng.), 3 Mee. & W. 220; Brown *v.* Windsor (Eng.), 1 Crompt. & J. 20; Hide *v.* Thorn-

On the other hand, it has been held that the erection and maintenance of a structure wholly on one's own land for a long period, is not the basis of a prescriptive grant to have it supported by soil of the adjoining owner, since no injury is inflicted upon the latter by which he could base an action to secure the removal of the building.[1] It is difficult, if not impossible, to apply the doctrine of prescriptive rights to instances of easements, so called, when there is no possession of anything belonging to another, no encroachment upon another's right, no adverse user, in fact nothing done whatever against which another can complain as the adjoining owner, and for which no action can be brought, there being no remedy existing whereby to prevent such a presumption from arising; as, for instance, in the case of windows overlooking the premises of the adjacent owner. Such a proprietor of the adjoining land would not have any right of action and no claim for damages for the wrong done. He would be forced to build a structure or construct a wall to obstruct the windows, merely to show that he is lord of his own soil, or he might forever lose the right to the full use of his property.

Every argument advanced against an easement for light and air may be applied with full force to the claim of right by the owner of the building erected on the line of his lot to the lateral support of the adjacent soil, on the ground that his building has been standing there for a given number of years. Neither in the case of a window nor of a building erected up to the dividing-line has the owner committed an act against which his neighbor can protest. He has not touched his property, nor invaded any right, nor given any cause of action. He has a right to use or build on his lot to the furthest limit of his boundary. He has only done this, and never has had any use or possession or enjoyment of any right, corporeal or incorporeal, belonging to another to which objection could be made in any form, and it would therefore be a misuse, as well as an abuse, of the terms "license," "grant," and "acquiescence" to say that he had acquired a right by means thereof from the owner of the adjacent lot.[2]

Neither have the owners of ancient buildings which adjoin each other any reciprocal easement of support from each other's buildings; but either may remove his own building without liability for damage resulting to the other, providing he gives proper notice of the intended removal, and uses reasonable care and caution not to injure the wall of the remaining building.[3]*

327. In Making Improvements on One's Land the Owner must Exercise Care.—An owner of land who excavates to a depth lower than the foundation

borough (Eng.), 2 Car. & Kir. 250. *But see* Kilgour *v.* Wolf (Com. Pl.), 4 Ohio N. P. 183, *an American case.*

[1] Sullivan *v.* Zeiner (Cal.), 33 Pac. Rep. 209; Kilgour *v.* Wolf (Com. Pl.), 4 Ohio N. P. 183.

[2] *Trippe, Justice, in* Mitchell *v.* Mayor of Rome, 49 Ga. 19; Hoy *v.* Sterrett (Pa.), 2 Watts 327, 460; 1 Amer. Law Review 10; Solomon *v.* Winters Co. (Eng.), 4 H. & N. 585. *And see* Gillmore *v.* Driscoll, 122 Mass. 199; Tunstall *v.* Christian, 80 Va. 1; Napier *v.* Bulwinkel (S. C.), 5 Rich. 311; Jones on Easements, § 606.

[3] Jones on Easements, § 607.

* *See* Sec. 335, *infra.*

of a building on the adjoining lot, having failed to notify the owner of the building to protect his property, will be liable for the fall of the foundation-wall if it is caused by failure to do anything which ordinary care and diligence in such operations point out as necessary to protect it, but will not be liable if the fall is caused by the wall's own insufficiency.[1] It is necessary that the house and its foundations should have been properly constructed.[2] If not so built, and if, by reason of defective materials or construction, the excavation on adjacent land caused it to fall, the owner of the land making the excavation will not be liable.[3] So long as the excavation does not extend beyond the owner's land, and is not negligently or unskillfully made, any injury to adjacent owners must be borne by such owners. The excavation must be such as would not have caused any appreciable damage to the adjacent land in its natural state.

It is not enough merely to give notice; the law requires the landowner to exercise a reasonable degree of care and skill. If the injury result from the negligent, unskillful, and improper manner of doing the work (making the excavation) the owner will be liable.[4]

In some states it is held that if the structure has been erected and suffered to remain for the full period of time required to create a prescriptive right and to enjoy the support of the soil of the adjacent owner, then the latter may not disturb its foundation by digging within his own lot without adopting reasonable and proper precaution to prevent any injury to such house. These decisions for the most part are in cases where the two adjoining owners have acquired their land from the same grantor, or where both lots were formerly owned by one of the adjoining owners.[5]

Where two houses have been built together in such a manner as obviously to require mutual support, and one of them has been conveyed, there is both an implied grant and an implied reservation of mutual support of the two houses, so that the owner of one cannot remove it without protecting the other by some adequate support.[6] In such cases it is presumed that the grantor conveyed to the adjoining owners the right of lateral support.

[1] Spohn *v.* Dives (Pa. Sup.), 34 Atl. Rep. 192; Clemens *v.* Speed (Ky.), 19 S. W. Rep. 660. But see Cohen *v.* Simmons (Sup.), 21 N. Y. Supp. 385.

[2] Richart *v.* Scott (Pa.), 7 Watts 460.

[3] Richart *v.* Scott (Pa.), 7 Watts 460. *But see* Cohen *v.* Simmons (Sup.), 21 N. Y. Supp. 385.

[4] Dodd *v.* Holme, 1 A. & E. 493; Foley *v.* Wveth, 2 Allen 131; Panton *v.* Holland, 17 Johns. 92; Charles *v.* Rankin, 22 Mo. 573; Shrieve *v.* Stokes, 8 B. Mon. 453; McGuire *v.* Grant, 1 Dutch. 356; Sullivan *v.* Zeiner (Cal.), 33 Pac. Rep. 209. *And see* Richardson *v.* V. C. R. Co., 25 Vt. 465, 471; Washburn's Easements, ch. 4, sec. 1; Bradley *v.* Christ's Hosp., 4 Mann. & G. 761; Peyton *v.* Mayor (Eng.), 9 Barn. & Cress. 725; Walters *v.* Pfeil (Eng.), 1 Mood & Mlk. 362; Massey *v.* Gayder, 4 Car. & P. 161; Lasala *v.* Holbrook (N. Y.), 4 Paige 169; Louisville & N. R. Co. *v.* Bonhays (Ky.), 21 S. W. Rep. 526; Watson Lodge *v.* Drake (Ky.), 29 S. W. Rep. 632; Leavenworth Lodge *v.* Byers (Kan.), 38 Pac Rep. 261.

[5] Lasala *v.* Holbrook (N. Y.), 4 Paige 169.

[6] Jones on Easements, § 605; Webster *v.* Stevens, 5 Duer 553; Eno *v.* Del Vecchio, 4 Duer 53; Richards *v.* Rose, 24 E. L. & Eq. 406; s. c., 9 Exch. 218; Solomon *v.* Vintner Co., 4 H. & N. 598.

These cases must be distinguished from those where one of two persons owning two adjoining vacant lots, built a structure upon his lot. He can acquire no rights to lateral support for such structure in the lot of his neighbor independent of a grant, nor will any length of time furnish evidence of such a grant.[1]

328. Notice to Neighbor of Excavation should be Given.—A landowner who excavates for a cellar on his land, using ordinary care and skill, after due notice to the adjoining owner, is not liable to the latter, although in digging on his own land he digs so near the foundation of such adjoining owner's house as to cause it to settle or fall.[2] If notice of a contemplated excavation has been given, the owner making the excavation is bound only to a reasonable degree of care and skill.[3] In excavating he has a right to go below an adjacent owner's foundation-wall, even though it is reasonably certain that such foundation-wall will be endangered thereby; and after giving due notice to such adjacent owner, the person excavating is chargeable only with reasonable care; it being the duty of the adjacent owner to use the necessary appliances to protect his building.[4] On the other hand, an adjoining owner will not be restrained from placing his footing-stones on a higher level than his neighbor's.[5]

Where the owner or tenant of a building has knowledge that an adjoining landowner intends and is proceeding to excavate on his land, he must take any precautionary measures necessary to prevent damage to the building by the mere making of such excavation in an ordinarily careful manner, but he need not guard against damages resulting from negligence.[6]

Where one of two adjoining landowners has built a cellar-wall on the line, leaving some rocks projecting over, on notice that the other is to excavate he is bound to shore up and protect his property. Not having done so, he cannot recover for the caving thereof, the other having used ordinary care in excavating and breaking off the projecting rocks.[7]

329. Remedy for Injury to Support.—The remedy for violating the right to lateral support is in most cases an action for damages. An injunction will be granted only in cases where a serious injury is imminent.[8] An injunction has been granted where the plaintiff had built a retaining-wall to support the defendant's adjoining lot though the lot was built upon the defendant's land, he having agreed to furnish the grounds if the plaintiff would build a wall.[9]

A person in possession of lands is entitled to an injunction to prevent any

[1] Washburn on Real Property (3d ed.) 334; Peyton *v.* Mayor of London, 9 B. & C. 725; Napier *v.* Bulwinkle, 5 Rich. 311.

[2] Obert *v.* Dunn (Mo.), 41 S. W. Rep. 901. *See* Clemens *v.* Speed (Ky.), 19 S. W. Rep. 660.

[3] Block *v.* Haseltine (Ind. App.), 29 N. E. Rep. 937.

[4] City of Covington *v.* Geylor (Ky.), 19 S. W. Rep. 741.

[5] Graves *v.* Mattison (Vt.), 32 Atl. Rep. 498.

[6] Behrer *v.* Dienhart Harness Co. (Ind. App.), 49 N. E. Rep. 296 [1898].

[7] Lapp *v.* Guttenkunst, 44 S. W. Rep. 964.

[8] McMaugh *v.* Burke, 12 R. I. 499; Trowbridge *v.* True, 52 Conn. 190.

[9] Cronsdale *v.* Lanigan (Sup.), 13 N. Y. Supp. 31 [1891].

excavation on neighboring land which will cause subsidence or destruction of the highway in front of his premises, or take away the lateral support of the soil in its natural state, without the burden of any buildings upon it, and also upon a proper showing to injunctive relief during the pendency of the action.[1]

330. Measure of Damages for Loss of Support.—The measure of damages for the withdrawal of lateral support of land is the diminution of the value of the land caused by the fall of the soil.[2] It is the actual damage to the land by the loss of and injury to the soil alone, and is neither the cost of restoring the land to its former condition nor its diminished market value.[3] The damages have been confined to the lot alone, independent of the buildings thereon.[4]

In Delaware, where the owner of a city lot excavated along the division-line for the purpose of reducing the level of his lot to the grade of the street, causing plaintiff's lot to cave in, it was held that plaintiff might recover the amount required to restore his property to its former condition, with as good means of lateral support.[5] The measure of damages is not the depreciation in value by reason of the existence of the excavation of the defendant's land, but the diminution in the value of the land by reason of the falling, caving, or washing of the soil as the natural result of removing its lateral support.[6] If the plaintiff would recover special damages, as for the obstruction of drains or destruction of a fence, such injuries must be specially alleged, and their value shown, to entitle plaintiff to recover therefor.[5] The fact that the building had been condemned by the building inspector does not prevent plaintiff from recovering for such injury.[7]

The right to lateral support is not an absolute right irrespective of the element of damages; and if the support be disturbed, it is not a cause of action unless there be appreciable damages. A man may make excavations upon his own land the same as he may exercise any other act of ownership, and it becomes a tort only when it injures his neighbor, which gives rise to a cause of action. There is no right of action unless the soil is disturbed, even though the land presents an unsightly appearance in consequence of the excavation.[8]

To give a good cause of action it is only necessary to show a neglect to furnish proper support to the land so as to prevent its caving in.[9] To make

[1] Finegan *v.* Eckerson, 52 N. Y. Supp. 993 [1898].

[2] Shultz *v.* Bower (Minn.), 59 N. W. Rep. 631; McGuire *v.* Grant (N. J.), 1 Dutch. 356; McMaugh *v.* Burke, 12 R. I. 499; Trowbridge *v.* True, 52 Conn. 190.

[3] McGettigan *v.* Potts (Pa. Sup.), 24 Atl. Rep. 198; White *v.* Dresser, 135 Mass. 150.

[4] Conboy *v.* Dickinson (Cal.), 28 Pac. Rep. 809. *But see contra*, if defendant was negligent, Louisville & N. R. Co. *v.* Bonhayo (Ky.) 21 S. W. Rep. 526.

[5] Stimmel *v.* Brown (Del.), 7 Houst. 219.

[6] Schultz *v.* Bower (Minn.), 66 N. W. Rep. 139.

[7] Bonquois *v.* Monteleone (La.), 17 So. Rep. 305.

[8] Williams *v.* Kenney, 14 Barb. 629.

[9] Jones on Easements, § 588.

a case, one need show only the making of the excavation, and the subsequent injury to the adjoining land by reason thereof. It is not necessary to show that the excavation was made in a careless, negligent, or unskillful manner. The action ruling in such cases is not the making of the excavation, but the weakening of the support so as to allow the neighbor's land to fall. It is an incident to the right of property. The measure of damages in such cases is the diminution of the value of land by reason of the falling of the soil, and it is immaterial whether this falling be called caving or washing. It is the natural and approximate result of taking away the lateral support.[1]

Where a lot-owner, in excavating on his lot, injures the wall of the adjacent owner standing three inches back from the line, such adjacent owner cannot recover for injury to his building on account of the displacement of the three inches of ground unless such displacement was both the proximate and independent cause of the damage; and if such displacement was with the consent of the owner, he cannot recover even nominal damages therefor.[2] If an excavation causes the soil of neighboring land to give way on account of its gravelly and sandy condition and not because a building has been located upon the neighboring land four and one-half feet from the division-line, the party making the excavation is liable for the damage to the land and building by his failure to protect the plaintiff's building, especially when it could have been done at little expense. Even if the inevitable result of the willful removal of the soil be the fall of the house, the failure of plaintiff to take steps to avoid the injury will not prevent him from recovering the damages to land and building.[3]

331. What Care and Diligence must be Exercised.—A rule that requires a landowner having excavation done "to use such care and caution as a prudent and experienced man in such work would have exercised if he had himself been the owner of the injured building" was held wrong, as it tended to mislead. One who was owner of both the lots might very prudently subject himself to expense and inconvenience for the protection of his building that could not justly be imposed upon his neighbor.[4] The question is, "Was there actual negligence in making the excavations?" It is not a good defense to allege "the use of such care as the defendant's builder and superintendent, a skillful and careful person, deemed necessary."[5]

To be rendered liable the landowner must have failed to take reasonable care to prevent the injury, or malice must be shown. An allegation that defendant did the act maliciously, intending to injure the plaintiff, was held not sufficient.[6] The fact that the excavation was made by a contractor does

[1] Jones on Easements, § 588.
[2] City of Covington *v.* Geylor (Ky.), 19 S. W. Rep. 741.
[3] Gildersleeve *v.* Hammond (Mich.), 67 N. W. Rep. 519.
[4] Charles *v.* Rankin, 22 Mo. 566; People *v.* Canal Bd. (N. Y.), 2 Sup. Ct. (T. & C.) 275 [1873].
[5] Charles *v.* Rankin, 22 Mo. 566; Austin *v.* Hudson R. R., 25 N. Y. 338, 346.
[6] Panton *v.* Holland, 17 Johns. 92.

not relieve the owner from liability.[1] The general rules as to negligence and what constitutes due care and skill apply.[2]

The distinction between injury to buildings and structures erected on the land, and to the land alone must be kept in mind. It is not a question of negligence in making an excavation when the natural support of the adjoining lot is removed. One is liable without regard to his negligence.[3]

A complaint for damages for caving in of plaintiff's premises, resulting from defendant's excavation on an adjacent lot, which sufficiently avers the negligence, carelessness, and unskillful workmanship of defendant, is sufficient though it fails to aver that plaintiff had no notice of defendant's intention to excavate.[4]

The burden of proof is upon the owner of a building to show that he has exercised reasonable care when the building has fallen into an adjoining street or highway. In the absence of such proof it may be presumed that he was negligent.[5]

332. Liability for Failure to Exercise Care.—The landowner must not leave the excavation open to inclement and excessive weather. If he negligently leaves the excavation exposed, so that rain-water runs into it and causes the land of an adjoining proprietor to give way, to the injury of the buildings thereon, he is liable for such injuries though the rain may have been an unusual and excessive one; for it would not have run into the excavation except for his negligently leaving it exposed.[6]

When one of two adjoining landowners, on excavating for a cellar up to the division-line, on which the other had built a cellar-wall, undertakes, upon compensation from the other, to remove the parts of the existing wall projecting over the line, he is responsible for injury to the wall arising from his failure to protect it as persons of ordinary care, skill, and prudence would have done under the same circumstances.[7] If he undertakes to protect an adjacent owner's foundation-wall by underpinning it, he is bound to use reasonable care; and whether the injury resulted from want of such care or from the sandy character of the ground is a question for the jury.[8]

333. Precautions to be Taken to Prevent Injury.—It must not be understood from the law of lateral support that a landowner may not improve his land by sinking foundations and making excavations therefor, for that would be almost as unjust to the landowner as the mischief that would result to his neighbor if he were allowed to undermine his property. The possession of land would be of little benefit to the owner if he could not improve it and enjoy the benefits of such improvements.

[1] Dorrity *v.* Rapp, 72 N. Y. 307.
[2] 12 Amer. & Eng. Ency. Law 938.
[3] Ludlow *v.* Hudson Riv. R. Co., 4 Hun 239, 6 Lans. 128.
[4] Block *v.* Haseltine (Ind. App.), 29 N. E. Rep. 937.
[5] Mullen *v.* St. John, 57 N. Y. 567.
[6] Ulrick *v.* Dakota Loan & Trust Co. (S. D.), 51 N. W. Rep. 1023, *affirming* 49 N. W. Rep. 1054.
[7] Lapp *v.* Guttenkunst, 44 S. W. Rep. 964.
[8] City of Covington *v.* Geylor (Ky.), 19 S. W. Rep. 741.

A landowner is not required to excavate on his own land for a cellar by piecemeal, or build his wall in sections, to prevent a building on the adjoining owner's land from falling.[1] But if he has told the adjoining landowner that the proposed excavation for a building would be made in the usual manner by removing the dirt "in sections" and walling up one section before another was opened, the latter is entitled to rely upon such representations, at least until a reasonable opportunity has been given him to take measures for the protection of his building; and where, after one section has been built substantially as promised, the removal in sections is abandoned, and the dirt is all taken out at once, thereby occasioning the fall of the building only a few hours afterwards, it cannot be said as a matter of law that such opportunity to protect the building was given.[2]

The right of an adjoining owner to lateral support may be asserted as well against a municipal corporation making excavations in changing the grade of a street as against private individuals.[3]* The removal by a railroad company, in excavating for its road, of the lateral support of the soil adjoining its right of way is a taking of property, and the right can only be acquired by purchase or condemnation.[4]

It has been held that if the person making the excavation had no reason to suppose that it would occasion the injury which arose from some unforeseen cause, he was not liable for the damages.[5]

334. Right of Support for Surface of Ground.—Where there are two freeholds in the same plot of ground, one in the surface and the other in the mines beneath the surface, as is often the case, the one who excavates for minerals must be careful to supply necessary supports for the surface-soil, if his excavation endangers its natural support.[6] If the owner of the surface has had a house standing thereon for the prescriptive period, the one excavating for minerals is bound to leave or provide support for such house as well as the soil.[7] If the house were a new one, would he also be bound to provide this support? These cases arise most frequently in coal-mining districts. It is well settled that when a party has conveyed land to another, reserving to himself the right to remove the coal underlying the land, he must exercise ordinary care in removing the coal. If such care requires that pillars or ribs of coal shall be left in order to support the surface and protect the property of the surface owner, their removal will constitute negligence, and the surface owner may recover damages for the loss caused thereby.[8] However, the lessees of a partially worked-out coal-mine are not liable for damages

[1] Obert *v.* Dunn (Mo.), 41 S.W. Rep. 901.
[2] Larson *v.* Metropolitan St. Ry. Co. (Mo. Sup.), 19 S. W. Rep. 416.
[3] Stearns' Ex'r *v.* City of Richmond (Va.), 14 S. E. Rep. 847.
[4] McCullough *v.* St. Paul, M. & M. Ry. Co. (Minn.), 53 N. W. Rep. 802.
[5] Shrieve *v.* Stokes, 8 B. Mon. 453.
[6] English cases in 2 Washburn on Real Property 333.
[7] Rogers *v.* Taylor, 2 H. & M. 828.
[8] 12 Amer. & Eng. Ency. Law 938, *and American cases;* Lord *v.* Carbon Mfg. Co., 42 N. J. Eq. 157 [1886].

* *See* Sec. 334, *infra.*

by subsidence caused by excavations made by their predecessors prior to the date of their lease, though they took no measures to arrest the subsidence.[1]

The liability of a city or town for taking away the lateral support of a public street, and for the damages resulting thereby, has not generally been considered. In many of the states, notably those of Minnesota, Massachusetts, Ohio, Virginia, Illinois, Indiana, Kentucky, and Pennsylvania, cities and towns have been held subject to the same liability as a private owner. In Ohio the removing of lateral support by a city or town is regarded as the taking of land for public purposes, and a compensation is required to be paid for such taking. If the land has been improved, and the weight of such improvements has not conduced to the falling of the land, the cost of such improvements may be recovered from the city or town.[2]

A city has been held liable for the settlement of a structure by reason of a sewer, built by the city under a street in "made ground," it being shown that the injury was the result of the construction of the sewer and not due to the condition of the ground. No recovery would have been had if the ground upon which the house stood was soft and inadequate to sustain the building under conditions which are usual in the conduct of necessary public works upon highways.[3] Where a sewer commissioner authorized the construction of a sewer through a street, and the excavations therefor induced a flow of quicksand from beneath the surface of abutting land, causing the building thereon to settle and its walls to crack, it was held that the commissioner was liable for the injury. The owner of the buildings did not show that he owned the street where the sewer was constructed. Had he owned the fee in the street, it was said that the taking the land for a sewer imposed no additional servitude upon the highway,[4] and the rights of the owner were not invaded. The commissioner had no right to take the soil (quicksand) of the plaintiffs in land which they had not taken under the statutes, nor to withdraw the support to his land abutting on the street.[5]

A city has been held liable for negligently excavating a river-bottom around and near to piles on which a building rested, whereby the building was undermined; especially where it appeared that the excavation was made for the purpose of saving expense of frequent removals of sand and sewage deposited by the city in the river by the maintenance of a sewer. It was held that excavation was not a legitimate dredging which the city was entitled to do for the improvement of its harbor in the interests of navigation.[6]

The vendor of land adjoining other land of his own, under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly

[1] Greenwell *v.* Low Beechburn C. Co. (Eng.), 2 Q. B. 165 [1897].
[2] Keating *v.* Cincinnati, 38 Ohio St. 141.
[3] Ladd *v.* Philadelphia, 171 Pa. St. 485.
[4] Chelsea Dye-house *v.* Commonwealth, 164 Mass. 350; Lincoln *v.* Commonwealth, 164 Mass. 1.
[5] Cabot *v.* Kingman, 136 Mass. 403.
[6] Pomroy *v.* Granger, 18 R. I. 624.

covenants that he will not use the land retained, or permit it to be used, in such a manner as to derogate from his grant; and he or his lessee will be enjoined from working the mines within such a distance from the grantee's land as would be reasonably calculated to endanger its stability.[1]

One is not restricted from mining near his neighbor's land because the latter has erected heavy structures near the division-line; but he is bound to observe proper care not to cause the adjoining proprietor more damage than is fairly incident to the prosecution of the work.

Where, in conducting mining operations, one has omitted to leave the pillars and other supports necessary to insure the absolute safety of the superincumbent surface, on which he has heavy structures and operates machinery, he is not entitled to lateral support from his neighbor's mines, and cannot enjoin such neighbor from mining with ordinary care up to the line between them, where the material is such that a perpendicular wall will sustain its own weight, and the natural pressure thereon, by the power of its own coherence.[2]

If one builds a house on his own land which has previously been excavated for mining purposes, he does not acquire a right of support for the house from the adjoining land of another. Therefore the owner of the adjoining land is not liable to an action if he works mines under his own land, so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be thereby injured. And so one taking coal from his own land is not liable for a subsidence caused in the surface of another's land, which is separated from the colliery by intermediate land from under which the coal had been worked out some years before by a third party, it being admitted that if the intermediate land had been in its natural state no injury would have been caused by the subsequent excavation of the coal. One has a right to work a mine up to the limit of his own land, and this right cannot be diminished by any act done by the owner of the adjoining land, or by the third person, for whose action the owner of the land is not responsible.[3]

The fact that a railroad company has bought and paid for its right of way does not relieve it from paying for an upheaval of adjoining lands caused by the construction of the road in a marshy place, and which has spread out beyond the limit of the right of way.[4]

The support of one's land may be the subject of an agreement wherein for a consideration the removal of support may be consented to. A grantor may reserve the right to enter upon a certain part of the land, to dig and take clay and sand for making brick, or to work minerals. In such case he may remove the lateral support of the land granted, by digging away the part designated in the exercise of the right reserved.[5]

[1] Jones on Easements, § 605.
[2] Jones on Easements, § 608.
[3] Jones on Easements, § 609.
[4] Roushlange v. Chicago, etc., R. Co. (Ind.), 17 N. E. Rep. 198 [1888].
[5] Ryckman v. Gillis, 57 N. Y. 68.

When land had been granted for building purposes, and the right to remove the minerals beneath had been reserved, but without the right to enter upon the surface, and it was provided that compensation should be made for all damages suffered from structures on the said plot by the grantor, it was held that he was entitled to take the minerals without leaving any support, subject only to compensation for damage done.

335. Lateral Support of a Structure. — When a boundary-line runs through a building or structure, cutting it in two, it seems that neither party can cut off that portion of the building or barn which is upon his property and leave the rest of the structure without support or shelter.[1] But when plaintiff and defendant respectively owned adjoining lots, obtained from the same original source of title, on which there were three houses, the middle one of which was about half on one side and half on the other side of the division-line, it was held that defendant had a right, where the house had been cut through on the division-line, to remove his half, since the use of the building was not a common servitude for both lots, and that the user of the water-pipes, etc., fell with a separation of the estate in the middle house.[2]

336. Encroachments or Projections upon Adjoining Land.*—A person who builds either above or below his soil, adjacent to his neighbor's property, must build in a perpendicular line. He may build as high as he pleases, although it may occasion inconvenience by shutting out light and air, provided the building does not cause damage.[3]

A landowner has a good cause of action in ejectment against the owner of an adjoining lot who has erected, with notice, buildings whose eaves project several inches over and upon the landowner's lot.[4] One who, by mistake of the district surveyor in locating the line of his lot, constructs the foundation-wall for a building so that it projects for an inch and a fraction, underground, onto an adjoining lot, may be compelled to remove it so that it shall not encroach.[5] If the foundation be wholly upon the lot of the owner, but a part of the wall or building overhangs an adjoining lot, it may be enjoined and its removal required for so much as it overhangs.[6]

Injunction will lie to compel removal of the wall of a building placed by defendant on plaintiff's side of a boundary, there being no adequate and plain remedy at law. Injunction to compel removal of a wall will be made perpetual, without resort to law to determine title, where the questions of title and right of possession are only incident to the question of boundary.[7]

[1] Adams *v.* Marshall, 138 Mass. 338 [1885].
[2] Whyte *v.* Builders' League, 52 N. Y. Supp. 65, 23 Misc. Rep. 385.
[3] Oldstein *v.* Firemen's Bldg. Assn. (La.), 10 So. Rep. 928.
[4] Lepreel *v.* Kleinschmidt (N. Y.), 19 N. E. Rep. 812 [1889]. *And see* Anglecey *v.* Colgen (N. J.), 9 Atl. Rep. 105 [1887].
[5] Pile *v.* Pedrick (Pa. Sup.), 31 Atl. Rep. 647.
[6] Lyle *v.* Little (Sup.), 33 N.Y. Sup. 8; Harrington *v.* McCarthy (Mass.), 48 N. E. Rep. 287 [1897].
[7] Norton *v.* Elwert (Oreg.), 41 Pac. Rep. 926.

* *See* Secs. 455, 608, *infra*.

The adjoining owner, by utilizing the wall in the construction of a building on his land may lose his right to demand a demolition of the wall.[1]

Where, however, only an occasional stone of the foundation of a house projected a short distance into plaintiff's land below the surface, and this encroachment was unintentional, and the defendant, on discovering it, after the house was nearly completed, "offered to pay plaintiff any sum he might claim," but plaintiff refused anything but removal, and no appreciable damage resulted to plaintiff, while removing of the projecting portions of the stones might be difficult and expensive, it was held that the plaintiff would be left to his remedy at law.[2] And where a wooden building encroached six inches on a private alley for more than twenty years, and the owner attempted to veneer it with brick, whereby it would encroach three inches more, and it did not appear that the encroachment would materially injure the right of way, it was held that the adjacent owner was not entitled to remedy by injunction.[3]

Where the encroachment of a building on premises agreed to be conveyed in an executory contract is not more than one-fourth of an inch upon the adjacent lot, it does not warrant a denial to the vendor of specific performance.[4]

If defendant's building encroach upon the plaintiff's land so as to injure the plaintiff's property, the owner who maintains these encroaching walls is guilty of a trespass and is responsible for any injury sustained thereby. The fact that at the time of the encroachment the defendant's property was in possession of a tenant does not relieve the defendant from liability.[5]

Exemplary damages should not be allowed for refusal of defendant to remove his building, overhanging plaintiff's lot, under a mistaken belief that plaintiff was responsible for the projection of the building, and that he was not obliged to remove it, though there was considerable delay after decree commanding him to remedy it; this being partly due to efforts to devise means to do the work without taking down the building.[6]

A lease of a building has been held to convey the land under the eaves and projections of the building if that land is owned by the lessor.[7]

When one of two adjoining lots has a house upon it with the corners projecting over the other lot, and the former is sold to a second person, the purchaser of the other lot cannot question the right to maintain the corners even though the first lot has come back to the original owner.[8]

Where adjoining owners erect buildings with reference to the supposed

[1] Monteleone *v.* Harding (La.), 23 So. Rep. 990.

[2] Harrington *v.* McCarthy (Mass.), 48 N. E Rep. 287 [1897].

[3] Hall *v.* Rood, 40 Mich. 46 [1879], *citing* 48 Mich. 368 *and* 65 Mich. 84.

[4] Katz *v.* Kaiser, 10 App. Div. 137, 41 N. Y. Supp. 776.

[5] Hefferberth *v.* Meyers (N. Y.), — App. Div. — [1896].

[6] Burruss *v.* Hines (Va.), 26 S. E. Rep. 875.

[7] Sherman *v.* Williams, 113 Mass. 481.

[8] Grace M. E. Ch. *v.* Dobbins (Pa.), 25 Atl. Rep. 1120.

boundary-line between them, there is a practical location of such boundary which may bind the parties.[1] *

Where a lot-owner has built over the line on the adjoining lot by mistake, and has had open, continuous, and exclusive possession for the statutory period with intention to hold adversely, it is adverse possession.[2] †

337. What Constitutes a Party-wall.—The original division-wall erected at the time of building two houses by the owner of either is not a party-wall, and does not become such by a sale of the houses to different parties.[3] A brick wall which is used in common, as the wall of two adjacent properties in a city, is a party-wall if erected partly on the soil of each and so used for many years without question or complaint by either.[4] A division-wall, built entirely on the land of one person, may by agreement, actual or presumed, become a party-wall.[5] If a neighbor has by mistake extended the foundation of a wall slightly onto an adjoining lot, it does not thereby become a party-wall.[6]

338. Property in Party-walls.—When a party-wall has been erected upon the division-line between two states, the adjoining landowner owns that part of the wall which stands upon his premises unless there is something to the contrary in the contract under which the building is erected. The fact that the contract provides that before the adjacent owner shall make any use of the wall he must pay to the party erecting it one-half the value thereof does not alter the case.[7]

It has also been held not to be a use of a party-wall where one relies upon it for protection, and so constructs his own wall of such materials as are generally used for outside work, if the wall be not attached to the party-wall and does not depend upon it for its support.[8]

An adjoining owner who has used a wall resting wholly on the land of his neighbor for the support of his building for the full statutory period acquires an easement in the wall which cannot be interfered with by the neighbor to the extent of cutting off the floor-beams on a portion of the building, even though it be done for the purpose of straightening the wall.[9] The right to such an easement is limited to the extent of the ancient user. The owner has a right to use it in any way that will not conflict with that right.[10] He

[1] Ford *v.* Schlosser (Com. Pl. N. Y.), 34 N. Y. Supp. 12. *But see* Griffiths *v.* Morrison (N. Y.), 12 N. E. Rep. 580 [1887].

[2] Wilson *v.* Hunter (Ark.), 28 S. W. Rep. 419.

[3] Moore *v.* Shoemaker (D. C. App.), 25 Wash. L. Rep. 72, 29 Chicago Leg. News 207.

[4] Kelly *v.* Taylor (La.), 10 So. Rep. 255.

[5] Dorsey *v.* Habersack (Md.), 35 Atl. Rep. 96; Mott *v.* Oppenheimer (N. Y. App.), 31 N. E. Rep. 1097.

[6] Pile *v.* Pedrick (Pa. Sup.), 31 Atl. Rep. 646.

[7] Mickel *v.* York, 66 Ill. App. 464.

[8] Sheldon Bank *v.* Royce (Iowa), 50 N. W. Rep. 986—*under* Iowa Code, § 2019, *distinguishing* Molony *v.* Dixon, 65 Iowa 136.

[9] Barry *v.* Edlavicht (Md.), 35 Atl. Rep. 170.

[10] Pearsall *v.* Westcott, 51 N. Y. Supp. 663 [1898].

* *See* Secs. 491–510, *infra*.

† *See* Secs. 511–540 and 682–691, *infra*.

cannot complain that the neighbor has built his wall higher and placed windows therein, since his right to the use of the wall was limited to the use he enjoyed during the period of prescription.[1]

Such an easement in a party-wall does not deprive the original owner of the possession of it, although the adjoining owner be entitled to the use of the wall.[2] Such an easement becomes appurtenant to the adjoining landowner's estate, and passes to his grantees.[3]

When a party has acquired the right to use a party-wall by complying with the statutes in regard thereto, the owner of the building already erected cannot complain that his neighbor's use of the wall will change a portion of the front of his building, and mar its appearance, if the use is exercised in a proper manner.[4]

339. Destruction or Demolition of Party-walls.—Where two houses are built together, the right to mutual lateral support exists only so long as the wall continues to be sufficient for the purpose and the buildings remain in a condition to require support. If the buildings be torn down and be not at once restored, the parties may assert their unqualified ownership and title to the division-line.[5]

When the owner of several houses so built that they require mutual support conveys one of them, he does not thereby lose the lateral support of it, the legal presumption being that the owner reserves to himself such right and at the same time grants to the new owner a like right.[6]

Any easement of an adjoining lot-owner created by a party-wall ceases when the wall becomes unfit for use either from age or accident.[7] A provision that the rights of the parties shall continue "so long as the wall shall stand" does not mean so long as any part of the wall itself shall remain, but so long as the wall shall remain fit for use as a party-wall.[8]

A beam-right in favor of adjoining premises, to continue until the wall of the servient premises is destroyed in any manner or torn down for the purpose of rebuilding, is an encumbrance upon the premises.[9]

340. Right to Build Party-wall Higher.—A joint owner of a party-wall has a right to increase its height, but in so doing is liable for any injury to the adjoining building, even though the addition is being built by a contractor, and the damage results from a wind-storm which causes the wall to fall.[10] An agreement whereby the right "to place joists to the depth of four inches, and to otherwise build into and against" the wall of plaintiff's house, "and to otherwise use the same as a party- or division-wall," is purchased,

[1] Barry *v.* Edlavicht, *supra.*
[2] Pearsall *v.* Westcott, *supra.*
[3] Barry *v.* Edlavicht, *supra.*
[4] Freeman *v.* Hairwig (Iowa), 51 N. W. Rep. 169.
[5] Moore *v.* Shoemaker, 10 App. D. C. 6 [1897].
[6] Moore *v.* Shoemaker, *supra.*
[7] Odd Fellows' Hall *v.* Hegele (Oreg.), 32 Pac. Rep. 679.
[8] Odd Fellows' Hall *v.* Hegele, *supra.*
[9] Schaeffer *v.* Miehling (Super.), 34 N. Y. Supp. 693.
[10] Brooks *v.* Curtis, 50 N. Y. 639; Negus *v.* Becker (Sup.), 22 N. Y. Supp. 986.

includes the right to increase the height of said wall.[1] When a person has the right to build the wall higher although it may shut off the view from the other party's windows and lessen the light coming thereto, he may do the same thing by the erection of a screen upon such wall, without entitling the other party to relief by injunction.[2]

When one of the joint owners has built the party-wall higher, it seems he cannot recover from his neighbor who uses such addition for the support of his house when he also builds higher, unless there is an express agreement to that effect.[3]

Under an agreement for the construction of a wall in common by joint property owners to the height of three stories on the land of one, there is no presumption that the other may, of his own motion and for his own benefit, extend said wall upward another story without regard to a threatened easement ripening therein, or of an injury likely to result to the property adjacent.[4]

Where it was mutually agreed that a party-wall should be built to a height of one story, and that either party could add to the wall in height, doing work from his own side, and the party who did not build the wall, wishing to go higher, built on top of such wall but on his own side of the line, it was held that such addition was not necessarily a party-wall.[5] A covenant that a building shall not be erected above a certain height is the grant of an easement which can be enforced by injunction proceedings instituted by adjoining property owners.[6]

341. Erection of Wall or Fence to Obstruct Light and View.—A lot-owner has the legal right to erect and maintain a board fence on his lot as high as he will, even to the roof of the house on the adjoining lot standing on the division-line, and even though the fence is built for the sole purpose of shutting light and air from the windows of the house, to the injury of its owner.[7] An owner of a house cannot enjoin his neighbor from erecting such a fence on the boundary-line so as to shut off the light and air.[8] He has no remedy even though he has enjoyed the light and air for more than fifty years.[9]

A servitude of light and air through windows in a wall cannot be acquired by prescription against the owner of the adjoining lot, at least not until

[1] Dorsey *v.* Habersack (Md.), 35 Atl. Rep. 96.
[2] Cagney *v.* Sweet, 67 Ill. App. 641 [1896].
[3] Allen *v.* Evans (Mass.), 37 N. E. Rep. 571.
[4] Calmelet *v.* Sichl (Neb.), 67 N. W. Rep. 467.
[5] Palmer *v.* Evangelico Soc. (Mass.), 43 N. E. Rep. 1028.
[6] Brown *v.* O'Brien (Mass.), 47 N. E. Rep. 195.
[7] Letts *v.* Kessler (Ohio), 42 N. E. Rep. 765; Levy *v.* Samuel (Super.), 23 N. Y. Supp. 825.
[8] Triplett *v.* Jackson (Kan.), 48 Pac. Rep. 931; Ladd *v.* Flynn (Mich.), 51 N.W. Rep. 203; *contra*, Kirkwood *v.* Finegan (Mich.), 55 N. W. Rep. 457.
[9] Kanabe *v.* Levelle (Super.), 23 N. Y. Supp. 818.

such owner has made the wall one in common, since until that time he is not able to assert the right to have the windows closed.[1] *

342. Openings in a Party-wall.—It seems that windows cannot be placed in a party-wall owned in part by the adjoining owners.[2] Openings in a wall for the insertion of iron beams have been held in effect to be windows in a party-wall, and as such unlawful.[3] A party-wall is presumably a dead or solid wall, and a builder becomes liable for trespass if he makes openings in it.[4] However, in Minnesota it has been held that holes cut four inches deep in an eighteen-inch wall for the insertion of joists and sleepers did not make a breach of a contract that the wall should be and remain a solid wall. The act of joining and building to a party-wall in a manner that is customary and proper does not violate the terms of the contract.

To determine whether a wall was improperly built, in that it contained flues which encroached two inches on defendant's portion of the wall, it is proper to ask an architect whether it is customary to build flues in party-walls.[5] Whether an encroachment of two inches by the flues was a substantial defect in the construction of the wall, and whether it prevented defendant from using the wall in the same way that plaintiff did, are questions of fact.[6]

343. Agreement of Adjoining Owner to Pay his Share of Cost of Party-wall.—Sometimes agreements are made by which an adjoining owner is to pay for his share of the cost of a party-wall when he shall have occasion to use it. When such is the case, the assignee or heirs of the party who owns the vacant lot take the said lot subject to the covenant, which may be enforced as a charge on the land.[6] An agreement between the owners of adjoining premises, whereby one is to build a party-wall, one-half on the ground of each, and the other is to pay for one-half the cost of its construction when he uses the same, will bind a purchaser of the estate of an owner so contracting if he avails himself of its benefits.[7] However, under an agreement on the part of the adjoining owner to pay when the party-wall shall be used by himself or his heirs or assigns, one who was a mortgagee when the said adjacent owner built upon his lot is not liable for such payment of one-half the cost of said wall, nor is he liable because he afterwards became owner of the lot through foreclosure, and occupied the building after its erection; the occupation and use of the building not being regarded as a use of the wall within the agreement.[8]

[1] Oldstein *v.* Firemen's Bldg. Assn. (La.), 10 So. Rep. 928; Wardens *v.* Lavezzolo (Mass.), 30 N. E. Rep. 471; Keating *v.* Springer (Ill.), 34 N. E. Rep. 805; Robinson *v.* Clapp, 65 Conn. 365.

[2] National Com. Bank *v.* Gray (Sup.), 24 N. Y. Supp. 997.

[3] Bedell *v.* Rittenhouse Co. (Com. Pl.), 5 Pa. Dist. Rep. 689.

[4] Bedell *v.* Rittenhouse Co., *supra.*

[5] Hammann *v.* Jordan (N. Y. App.), 29 N. E. Rep. 294, *reversing* 13 N. Y. Supp. 228.

[6] Pillsbury *v.* Morris (Minn.), 56 N. W. Rep. 170; King *v.* Wight (Mass.), 29 N. E. Rep. 644; Jordan *v.* Kraft (Neb.), 51 N. W. Rep. 286.

[7] Harris *v.* Dozier, 72 Ill. App. 542.

[8] Pfeiffer *v.* Matthews (Mass.), 37 N. E. Rep. 571.

* *See* Secs. 185, *supra;* 682–690, *infra.*

When a statute provides for the tearing down and replacing of an existing party-wall, and that the adjoining owner shall not use the said wall by building into or against it, or by using it for any new building until he shall have paid a portion of the cost, the adjoining owner is not made liable to pay until he begins to make a new use of the wall. The mere replacing of his beams in the wall as they had been in the old wall is not such a use, but a continuation of the old use.[1]

Where an act of legislature gave officers discretionary powers to regulate the thickness of party-walls, subject to a minimum thickness and a maximum encroachment on the adjoining lot, and it was provided that a permit to build as described might be issued in the discretion of the inspectors, it was held that a builder who had erected a party-wall of greater thickness than that prescribed in his permit could not require the adjoining owner to pay one-half the cost thereof, even though the encroachment was within the maximum limit.[2]

Where a party-wall has been erected by an owner under an agreement that his neighbor shall pay his share of the cost when he shall use the wall, said landowner, it seems, is not liable for the fall of the said wall upon his neighbor, where the building erected in connection with the wall has been burned. This was so held even though the adjoining owner had not made any use whatever of the wall.[3]

Under a party-wall agreement, one party was to be liable for half the cost of a wall built by the other whenever he built to such wall. He built a "studded" wall next to the party-wall, touching it and cemented to it, to keep out the moisture, and it was held that this constituted such a use of the wall as to make him liable under the agreement.[4]

Where one in building a house joins it to the wall of another house without a written contract, but supposing he had purchased a half-interest in the wall, equity will not compel him to detach his house from the wall, but will ascertain the damage which such use of the wall has been to the owner, and what advantage it has been to the other, and decree payment accordingly.[5] In determining the cost of a party-wall, the testimony of the architect as to the cost is a sufficient basis for a verdict on the agreement.[6]

[1] Hoffstot *v.* Voigt (Pa.), 23 Atl. Rep. 351.

[2] Kirby *v.* Fitzpatrick (Pa. Sup.), 32 Atl. Rep. 53. *See* Natl. Life Ins. Co. *v.* Lee (Minn.), 77 N. W. Rep. 794 [1899]; Keith *v.* Ridge (Mo.), 47 S. W. Rep. 904 [1898].

[3] Mickel *v.* York, 66 Ill. App. 464 [1896].

[4] Harris *v.* Dozier, 72 Ill. App. 542.

[5] Moore *v.* Owen, 46 S. W. Rep. 1005.

[6] Prefontaine *v.* McMicken (Wash.), 36 Pac. Rep. 1048.

CHAPTER XIX.

INTERFERENCE OR INVASION OF PROPERTY RIGHTS BY SURVEYORS.

351. Trespass.—Any interference with property rights is a trespass. A forcible disturbance of peaceable possession is a trespass, without regard to the question of title. An entry on land without license and without express or implied permission from the owner is a trespass. Generally the interference must be by direct physical force in order to give the party injured a cause of action. Mere words, as a rule, are not sufficient.

All persons are liable for the trespass who participate in the wrongful act, by aiding in it, advising it, or assenting to it. If an employer or servant aid, abet, or incite the perpetration of the trespass, he, as well as the person who commits the act, is liable.

The liability of the trespasser does not depend upon his intention to do the injury. He is liable for the mischievous or careless act, if injury result, even if done with the best intentions. A balloonist has been held liable for the acts of a crowd which broke into a garden to assist him in descending and to prevent him from being entangled in the trees, the crowd having trodden down the owner's vegetables and flowers.[1]

A trespasser is liable for cutting trees, though he did it under instructions from persons who had no authority in the matter.[2] A trespasser cannot justify himself on the ground of mistake. A person is expected to know the boundaries of his land, and whether his title to it is good and sufficient.

If the motive in doing an act were bad, that alone could not be made a ground of action if the rights of the property owner were not violated. Nor can a trespass be excused by showing that the plaintiff is a trespasser, a wrong-doer, or a violator of the law.[3]

The spirit in which the wrongful act is committed may be shown in mitigation of damages.

The owner may resist an entry upon his land, but he is not justified in killing the trespasser unless it is necessary to prevent a felonious destruction

[1] Guille *v.* Swan, 19 Johns. (N. Y.) 381.
[2] Allison *v.* Little, 85 Ala. 512.
[3] Hill *v.* Morrey, 26 Vt. 178 [1854]; 26 Amer. & Eng. Ency. Law 579.

of his property, or to defend himself against loss of life or great bodily harm.[1] A property owner has the right to order a trespasser from his premises, but he has no right to follow him up and provoke an attack upon himself so fierce as to require the taking of the trespasser's life in self-defence.[2]

352. Engineers and Surveyors as Trespassers.—Surveying and engineering operations often induce and sometimes require those who conduct them to commit trespass. Surveys are conducted on land, and obstacles are met. Rather than clear the line, surveyors sacrifice their safety and run risks by trespassing upon adjoining estates. Surveys must be made for proposed engineering structures, to determine their cost or practicability, before any steps have been taken to secure rights of way, and frequently before any privileges are sought. Every surveyor and engineer has had amusing and exciting experiences with obstinate and belligerent landowners. Men, women, dogs, and cattle have played almost as important a part in the protection of property as have the courts, but there are some cases recorded from which the following suggestions have been obtained.

There is no reason why a surveyor acting simply in his professional capacity should not be held for trespass the same as any other person; but the propriety and legitimate object of his work especially recommend him to the mercies of the court, and the damages assessed are usually merely nominal. Because of the trifling injury resulting from the trespass, few cases reach the higher courts, and few therefore are reported.

When a surveyor enters upon land of another for the purpose of making a survey, he is a trespasser, and is liable for any injury that he may do to the estate.[3] A person who enters with a surveyor for the purpose of making a survey is guilty of a trespass, because every unauthorized entry upon the land of another is a trespass. When one so enters and surveys a part of the land, even if he does not cut or mark trees or shrubs, he is a trespasser.[4]

The fact that the surveyor cut the trees under instructions from persons who had no right to authorize the cutting will not afford him a defense in an action for trespass, though he believed such persons had the necessary authority.[5] A surveyor has no more right to move or change a monument which marks the boundary of a field than has any one else.[6]

As to how far a county is liable for trespass or damages done to private property by its officers in the exercise of powers conferred for the benefit of the locality and its inhabitants, such as those relating to the opening and keeping open of roads, as distinguished from powers relating to the adminis-

[1] Carroll *v.* State, 23 Ala. 28.

[2] Tiffany *v.* Commonwealth, 121 Pa. St. 165.

[3] Ames Cases on Torts 82.

[4] Dougherty *v.* Stepp, 1 Dev. & Battle 371 [1835]; Tuffts *v.* Spring, 15 Mass. 135; Pfeiffer *v.* Grosman, 15 Ill. 53; Mundell *v.* Hugh, 2 Gill & J. 193; Brown *v.* Manter, 22 N. H. 472; Guille *v.* Swan, 19 John. 381; Newson *v.* Anderson, 2 Ired. 42; Norvell *v.* Thompson, 2 Hill (S. C.) 470; Carter *v.* Wallace, 2 Tex. 206, *accord*; Keller *v.* Masser, Tap. (Ohio) 43, *contra*.

[5] Allison *v.* Little (Ala.), So. Rep. 221 [1889].

[6] Gregory *v.* Knight, 50 Mich. 61.

tration of the general laws and enforcement of the general policy of the state, it has been held that when a member of the county board of supervisors who was also a road commissioner, claiming to act in his official capacity, with the assistance of other citizens repeatedly tore down a gate opening into private grounds, and insisting that the road through such grounds was a public road by prescription or dedication, and such road was thereafter declared a public road by resolution of the board of supervisors, and was surveyed and recorded as such, the county was liable for such trespass, and that the acts of the board of supervisors was an adoption and ratification of the officer's acts.[1] The placing by their engineer of stone bounds upon a line located by commissioners has been held not to be taking possession of the land.[2]

Where a superintendent of streets forcibly entered with his men upon another's land in pursuance of a vote of the board of aldermen, but not under vote of the city council, and not in reference to any property which the city claims to own, nor in performance of any work which the city was specifically authorized to do, nor in which the city had a corporate interest distinct from that of the town and the state, the city was held not liable to an action by the owner for the trespass.[3]

An idea of the liability of a surveyor as a trespasser may be derived from a case decided in Vermont in which a third party, who was a mere volunteer, not acting at the request of the defendant and not in his employ, cut a few small trees and poles upon the land of the plaintiff and over the boundary-line between the plaintiff and defendant. The volunteer was somewhat in the same position as a surveyor in the employ of the landowner when he undertakes to survey his land. The volunteer in this case had been requested by the landowner to be careful not to cut over the line. It also appeared that the adjoining landowner, the plaintiff, had told both his adjoining landowner and the said volunteer when they began to mend the fence that they must not cut upon his side of the fence. It was held that the defendant landowner was liable for the volunteer's acts when they were done in his presence and for his benefit and he had not dissented in any manner to such acts; that the defendant did cut the trees negligently and for want of proper information, and that the defendant was liable for the acts. If, however, the volunteer had been cutting trees by defendant's consent or direction and he knowingly or willfully, without defendant's consent or direction, cut trees upon the plaintiff's land or possession, then the defendant would not have been liable for such acts.[4]

Township officers trespassing upon land in the attempt to locate a section-line highway on a line other than its proper location are personally liable for the trespass.[5] But any conduct on the part of a property owner which

[1] Coburn *v.* San Mateo Co. (C. C.), 75 Fed. Rep. 520.
[2] Parker *v.* Co. of N., 150 Mass. 489.
[3] Manners *v.* Haverhill, 135 Mass. 165 [1883].
[4] Hill *v.* Morrey, 26 Vt. 178 [1854].
[5] Webster *v.* White (S. D.), 66 N. W. Rep. 1145.

prevents, because of bodily fear, a surveyor in making the survey of lands pursuant to an order from the court has been held an illegal resistance within the Revised Statutes of Louisiana, § 865, Act 11, 1882.[1]

It is sometimes difficult to determine whether certain acts are trespass or not. One question which has been raised in the schools is whether or not it is a trespass to pass over another's land in a balloon. It has been held that to shoot a pheasant which was over another man's land was an act of trespass.[2]

Whether or not the owner of a dog or cat is liable for trespass of the animal on land seems not to be well settled.[3] It may be the subject of statute law. Some cases are distinguished where a dog goes upon land of his own free will or fancy from those where he accompanies his owner or keeper.[4] The owner or keeper is held liable in the latter instance.

353. Trespass Committed by Surveyor or Engineer when a Public Officer.—When a surveyor or engineer is an officer of the state or of the Federal Government, or is acting by authority of either, or under powers granted to a corporation by the legislature, he is authorized to enter upon lands and perform his work, and cannot be interfered with, if acting within the scope of his duties. The entry must be for a temporary purpose and be accompanied with no unnecessary damage. Preliminary surveys and explorations for determining the route of a canal or railroad may be authorized by the state without compensation being previously paid or secured to an owner. This is so even though the Constitution requires the payment of compensation to precede a taking, on the ground that no estate is thereby taken, the owner not being deprived of the use and enjoyment of his property.[5] The occupation becomes a taking when it extends to an interference with the owner's use, to the construction of works upon the land, or to acts which are in the nature of waste.[6]

A railroad company must of necessity be permitted to go upon lands for the purpose of surveying and locating the line of its road, for until the line is located condemnation is impossible.[7] The right of examination by making survey is incident to the right of appropriation and necessary to its proper exercise.[8]

[1] Armstrong *v.* Vicksburg, etc., R. Co. (La.), 16 So. Rep. 468.

[2] See Kenyon *v.* Heart, 6 B. & M. 249.

[3] Ames Cases on Torts 78, *note, and cases cited;* Read *v.* Edwards, 17 C. B. N. S. 260.

[4] Beckwith *v.* Shordike, 4 Burrow 2092.

[5] Pierce on Railroads 194, *and cases collected;* Bloodgood *v.* Mohawk & H. R. Co., 14 Wend. 51, 18 Wend. 9; Polly *v.* Saratoga & W. R. Co., 9 Barb. 449; Bonaparte *v.* Camden & A. R. Co., Baldwin 205; Winslow *v.* Gifford, 6 Cush. 327; Cushman *v.* Smith, 34 Me. 247; Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504, 525; Orr *v.* Quimby, 54 N. H. 590; Lyon *v.* Green Bay & M. R. Co., 42 Wis. 538; Neal *v.* Pittsburg & C. R. Co., 31 Pa. St. 19, 2 Grant 137; Walther *v.* Warner, 25 Mo. 277; Doughty *v.* Somerville & E. R. Co., 3 Halst. Ch. 51, 63; State *v.* Seymour, 6 Vroom 47; Stuart *v.* Baltimore, 7 Md. 500.

[6] Davis *v.* San Lorenzo R. Co., 47 Cal. 517; Morris & E. R. Co. *v.* Hudson Tunnel R. Co., 10 C. E. Greene 384.

[7] Lyon *v.* Green Bay & Min. Ry. Co., 42 Wis. 544 [1887].

[8] Ward *v.* Toledo, etc., R. Co., 10 West. L. Jour. 365 [1853].

As Judge Cooley in his book on Constitutional Limitations[1] has said: "No constitutional principle is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of survey and other incipient proceedings with a view to judging and determining whether the public needs require the appropriation or not, and if so, what the proper location shall be; and the party acting under this statutory authority would neither be bound to make compensation for the temporary possession, nor be liable to any act of trespass." Sedgwick in his work upon Statutory and Constitutional Law[2] has gone a step further by saying: "In the construction of works of public improvement, as railroads or canals for instance, before it is known that the lands will be wanted preliminary steps, such for instance as surveys, are indispensably necessary. These preliminary steps are in themselves a trespass, and may sometimes, as by felling trees, work actual injury to the proprietor. On the other hand, if payment be not made before the work is actually begun, then, if it be discontinued or left in an imperfect state, the owner might be entirely remediless. In such a conflict of interests the current of decisions seems to tend to establish the rule that the preliminary steps in regard to public works may be taken without any compensation, but that before any definite act be done towards the construction of the improvement which is in the nature of the assertion of ownership, payments must be made or tendered, or a certain and adequate remedy provided." Redfield in his work on Railways[3] expresses a like view when he says: "It is settled that the legislature may authorize railway companies to enter upon lands for the purpose of preliminary surveys, without making any compensation therefor, doing as little damage as possible, and selecting such seasons of the year as will do least damage to the growing crops."

The proper rule to observe, in this respect, is such as a prudent owner of the land would be likely to adopt in making surveys for his own advantage.[4] In some states the party is made liable by statute for damages for temporary occupation.

In the English statutes, and in many of the special charters and general railway acts in the American states, the companies are bound to make compensation for such temporary use of the land where they do not ultimately take the land. In such a case, where the statute authorizes the entry upon land, the companies are not treated as trespassers, and even where the statute provides for no compensation it is not regarded as a taking of private property for public use within the provisions of the American state and United States constitutions.[5]

[1] Cooley's Const. Lim. (3d ed.) 560.

[2] Sedgwick on Statutory and Constitutional Law (2d ed.) 467.

[3] Redfield on Railways (5th ed.) 258.

[4] Cushman *v.* Smith, 34 Me. 247; Polly *v.* Saratoga R. Co., 9 Barb. 449; Bloodgood *v.* Mohawk & H. R. Co., 14 Wend. 51; s. c., 18 Wend. 9; Mercer *v.* McWilliams, Wright 132.

[5] Redfield on Railways (6th ed.), § 6, p. 247.

While a railroad company may be permitted to enter upon lands for the purpose of making preliminary surveys, it must also respond to the owner for any injuries done to his property; and in such case the party who owned or was in possession of the land when the injury was committed is entitled to damages, and not a subsequent purchaser.[1] In a case of trespass[2] against the defendant, who was in possession of a railroad as mortgagee, for running engines and cars over the plaintiff's land, this question is discussed by Shepley, J., and it is held that "to take the real estate of an individual for the public use is to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him," and that "the exclusive occupation of that estate temporarily, as an initiatory proceeding to an acquisition of a title to it, cannot amount to a taking of it in that sense." We are not prepared to hold that a substantial injury to real estate, as by the destruction of trees growing upon it, does not constitute a taking of it within the meaning of the constitution,[3] and the application of this doctrine to preliminary surveys seems to be settled by the authorities.

A railway or improvement company may reasonably expect its engineering force to carry on its preliminary and location surveys with as little conflict as possible with the property owners with whom they are likely afterwards to have to deal for right of way and other privileges and easements. It is an engineer's duty to keep relations with such property owners as pleasant as possible; and if the principle that "discretion is the better part of valor" be adopted, and the engineer seeks to obviate any contention or controversy, endeavoring to act entirely within all his rights, he will probably succeed better than if he act otherwise. He should know that he may make surveys and enter upon property for that purpose, doing no more harm than is reasonably necessary, and not be liable in an action of trespass.

In the state of New York, the Code of Civil Procedure, § 1682, provides that, in an action relating to real estate, where the court is satisfied that a survey of any property in possession of either party is necessary or expedient to enable either party to appropriate a building or to appropriate a way for travel, it may grant leave to enter on the property to make such a survey. Such act has been held to apply to an action for entering upon land and removing stone and materials therefrom. It is not limited to surveys of the surface of the land, but also includes underground surveys, as where a tunnel has been run underground and materials have been removed from it.[4]

354. Trespass by Government Surveyors.—"If trespasses of a temporary character may be lawfully committed by a private corporation, in a work preliminary to the construction of a railroad, without compensation, then it would seem that the same acts committed, under the direction of the

[1] Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66 (1881); Forbish *v.* Goodwin, 25 N. H. 425; May *v.* Slade, 24 Tex. 205.

[2] Cushman *v.* Smith, 34 Me. 256.

[3] *See* Eaton *v.* B. C. & M. Railroad, 51 N. H. 504.

[4] Howe's Cave L. & C. Co. *v.* Howe's Cave Assn. (Sup.), 34 N. Y. Supp. 848.

President of the United States, in executing the provisions of an act of Congress, with ample provision for the assessment of damages, might be authorized without requiring payment or security in advance." May trees be constitutionally cut without any compensation by a private corporation, preparatory to constructing a railroad, which cannot be constitutionally cut by the President of the United States for an important public use without payment or security in advance? Perhaps the injury done by the latter would originally be greater than that done by the former, but the constitutionality of the acts does not depend upon the extent of the injury done. Whatever reasons may have induced courts to decide that the temporary injuries to which we have referred may be allowed without violating any constitutional rights, a satisfactory ground upon which decisions may be based is that it was simply unavoidable. It is necessity, in a great degree, which justifies the right of eminent domain in all cases.

In a leading New York case[1] on this subject, which has been cited as decisive in the favor of the plaintiff, the Chancellor, in holding that "before the legislature can authorize the agents of the state, and others, to enter upon and occupy, or destroy, or materially injure the private property of any individual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages," recognizes that there may be cases of necessity in which the rule he lays down will not apply. A similar exception is recognized in other authorities which sustain the doctrine of the New York case. The settled and fundamental doctrine is that the government has no right to take private property for public purposes without giving compensation, and it seems to necessarily imply that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time with the actual exercise of the right of eminent domain."[2] "The maxim of law is that a private mischief is to be endured rather than a public inconvenience. If a common highway be out of repair, a traveller may lawfully go through an adjoining private inclosure."[3]

The inconvenience of procuring an assessment for damages, or of giving security for their payment in advance, of an actual appropriation of land as a site for permanent buildings, or as a reservoir for purposes of flowage, would be serious, or so far impracticable as to render a right to enter, subject to such conditions, of little or no value, and would greatly obstruct, if not altogether defeat, important public improvements. This case presents another instance in which the doctrine of necessity may be properly invoked.

The practical effect of holding that the defendant could not enter upon

[1] Bloodgood *v.* Mohawk & Hudson Company, 18 Wend. 9, 17.

[2] 2 Kent Com. (12th ed.), note *f*. *See* Orr *v.* Quimby, 54 N. H. 590 [1874].

[3] 2 Kent Com. (12th ed.) 338; Broom's Maxims 2.

the plaintiff's land for the necessary purposes of a coast survey, or that he could not do any substantial injury there after he had entered, without previously paying or securing plaintiff for the damage to be caused, would be to deny the right altogether. An assessment of the damages previous to the entry, or even previous to the injury, would be absolutely impossible. The damage done to the landowner by an entry upon his land "for the purpose of exploring, surveying, and triangulating the said coast, and for the purpose of leveling the same and doing any and all other necessary acts to effect the objects of the said several acts of Congress," could rarely if ever be ascertained in advance. At what point the agent of the government might need to erect temporary works, or over what lands they might have occasion to construct temporary roads, no human power could tell before entry. What trees or tree-tops or branches it might be necessary for them to remove from the line of sight could not possibly be ascertained, except by an actual experiment upon the ground. Obviously there could be no hearing before the commissioners for the assessment of the damages until after the mischief was all or nearly all done.

An entry upon and a temporary use of private property by the public for a preliminary survey, without compensation, are justified by the authorities. Whether there is any limit to the uncompensated damage that may be done by preparatory steps of that kind; what the limit is, if there is any; and whether such entry and use are an exercise of the police power,[1] are questions that seem not to be settled.[2]

The entry and injury must be reasonably necessary for the purposes of the survey or the trespasser will be liable to an action of tort. And an unnecessary entry and destruction of property is not excused because the trespasser is an agent of the United States, in the service of the Coast Survey, or is acting under the authority of an act of the legislature specially authorizing the entry and erection of works.

355. Surveyor's Interference with Travel on Highways. — To what extent a surveyor may occupy a road with his instrument, to the delay of travel, must be a question depending upon circumstances. Generally the rights of individuals to the occupation and use of a street or part of a street are equal. A surveyor can delay traffic no longer than a vehicle or a person, which would be determined by what was reasonable. Primarily streets are for travel. To what extent they may be used for surveying purposes is not well settled by the courts. What is a reasonable and proper use of a public or private way depends much upon public usage. The general use and acquiescence of the public is evidence of right. The owner of land may make such reasonable use of the way adjoining his land as is usually made by others similarly situated. In populous towns, where land is valuable, it is the custom to build to the line of the street. Building materials are placed in

[1] Winslow *v.* Gillford, 6 Cush. 327. [2] Orr *v.* Quimby, 54 N. H. 590 [1874.]

the street to the inconvenience and annoyance of the public, and excavations are made and embankments raised. Streets are blocked for brief intervals of time by trucks delivering materials, and for longer intervals by excavations for conduits to convey gas, water, and electricity. Surveying operations are necessary to these public improvements and to private work, and because of this it is equally reasonable that the public should put up with some inconvenience that they may be conducted. The time that such inconvenience may be imposed upon the public should be short and reasonable; it generally should not exceed three to ten minutes.

PART III.

DETERMINATION OF THE BOUNDARIES OF LAND. SURVEYS AND SURVEYING.

CHAPTER XX.

BOUNDARIES IN GENERAL. HOW DESCRIBED, ESTABLISHED, AND MAINTAINED.

361. Relation of Law and Surveying.—In order to understand questions and disputes pertaining to lands, some knowledge of the rights and privileges incident to land is necessary. Yet how few surveyors and engineers have anything but the most superficial knowledge of property, or the rights of the owner in his estates! As a result, it is not surprising that the courts are full of controversies in regard to their boundaries. The lawyer having little knowledge of surveying, and the surveyor less knowledge of law, mischievous results are brought about by the advice of the one profession, in opposition to the views and teaching of the other profession. The opinions of the lawyer are usually disregarded in the field, and the opinion of the surveyor suffers a like disregard in the law office and court-room, and the result is expensive and needless litigation, which might easily be avoided by a careful study of the rights and privileges of landowners and of the general law of boundaries, and by a proper application to the case of the sound principles of survey and an intelligent consideration of the practices, customs, and usages of surveyors and engineers.

362. Boundaries Described in Deed of Conveyance.—In locating or surveying a piece of property, the surveyor's primitive source of information is the contract, warrant, grant, or deed describing the piece of property to be located. There should be found a clear and complete description of the property; it should comprise a careful description of the property with reference to permanent and established monuments, lines, or bounds, and these with reference to one another. As an engineer in construction work finds his

relations, duties, powers, and obligations defined and described in the contract, so the surveyor must look for his instructions to the grant or deed describing the property to be measured or surveyed. The deed, old maps, field-notes of old surveys, and statements of landowners in the vicinity will assist materially in making out and locating a line in controversy, but the record of the survey should be found in the grant or deed of conveyance. The surveyor's duties are not limited to a careful examination and study of the description by monuments, metes, and bounds, but he should also note carefully the dates, the names of the parties, the grant, and such references as are made to other lands and persons. He should study the case to make himself familiar with its history for as many years as is possible, to the end that he may do justice to the parties interested.

363. Phraseology of a Description is Important.—The phraseology of a description is a very important consideration in describing a survey. If the draftsman be not careful and precise in his language, he may do irreparable injury to his client. The use of simple words such as "shore," "bank," and "stream," or "by," "along," "on," and "by the side of," are often important in determining the boundaries of land, for they have particular meanings in the law. The surveyor should also remember that the line he runs out or surveys is not always the one to incorporate in a deed or description; but, in describing land, he should include within the deed all the land that his client rightly owns or has just claims to. Old descriptions should not be repeated, but may be incorporated by reference and a declaration in the deed of conveyance that "the survey includes all that tract of land conveyed to John Smith by John Doe by deed dated ——— and recorded in ———, and certain other lands acquired by John Smith by descent [or purchase, or adverse possession, or accretion, etc.], and described as follows: . . ."

Such a practice would clear up many old titles and ambiguous descriptions, and set at rest once for all a common source of trouble and litigation between neighboring landowners. There should be a clear reference to titles and descriptions of earlier conveyances, so that the chain of title can be followed, and a careful explanation of the variance between the new and the old descriptions should be included. The universal practice of attorneys to perpetuate old descriptions of estates, drafted from surveys made with a Jacob's-staff and from distances that were paced, is to be condemned, and can be excused only by a desire to be extremely cautious and to save themselves or their asociates trouble when they have to search the title at some future day. More good would result if they would correct defective descriptions by having the land surveyed and thus save their clients litigation over boundaries loosely defined and described.

364. Boundaries Defined.—A boundary is the delineation of the limits of a tract of land, or the separation, natural or artificial, which marks the confines or lines of division of two adjoining estates. These limits may be

pointed out and determined by reference to a variety of things having some connection with the land and indicating its extent.

365. Government Boundaries.—Boundaries of our country and of its numerous subdivisions are fixed and determined in the same manner as are those of private estates. Whether located by natural or artificial lines and monuments, their determination differs from those of private lands only in their size, magnitude, and extent. What may be said of private boundaries will apply for the most part to those of the larger divisions, as towns, counties, and states. When there are material differences they will be pointed out.

The settlement or adjustment of a disputed boundary-line between states requires not only ratification by the state, but the assent of Congress, before the line as adjusted can be accepted as binding.[1]

A public boundary-line established by authority of the government is binding on all citizens and all private interests, and the grounds or correctness of its establishment cannot be inquired into in a suit between private persons.[2]

366. Boundaries Defined by Monuments.—Property is generally described with reference to fixed marks, lines, or stations; and if these were permanently fixed and definitely described there would be fewer disputes and much less work for both surveyors and lawyers. The great difficulty and expense of erecting permanent monuments has led to the adoption of natural features, such as streams, ponds and lakes, rocks, and trees. These are subject to changes and decay, and their diversions and natural variation have involved this subject in complication and disorder. These changes, together with the universal element of ignorance and carelessness characteristic of the human race, are what create the questions discussed in this work. Natural or artificial marks which indicate the confines or lines of division of contiguous estates are called boundaries.

The description should not only securely locate the lot, but it should contain more than merely enough to secure its location at the present time. The surveyor must look for future changes and transformations to which property may be subjected. Streets and roads are straightened and made wider as traffic increases; whole districts are burned over, and when rebuilt their plan is changed; streams are constantly encroaching or receding upon estates which they bound; neighbors, in their strife for gain, are making changes to benefit themselves even to the loss of adjoiners; adjacent parcels of land are acquired by one proprietor, bounds destroyed, and again the whole is subdivided. All such changes the surveyor should anticipate, and meet the varying conditions in his description and location.

367. Boundaries—How Established.—Boundaries of land are established or defined in different ways, depending largely upon the manner in which titles to estates are acquired, viz., by *grant* or by *law*. When land is acquired

[1] New Castle Circle Boundary Case (C. P.), 6 Pa. Dist. R. 184.

[2] Hitchcock *v.* Southern Iron & T. Co. (Tenn. Ch. App.), 38 S. W. Rep. 588.

by grant the boundaries are defined in the deed or patent, which description is a very essential part of every grant. The description is the part of the deed with which the surveyor has to deal. Its interpretation, construction, and application are the first things to be considered in the field operations of surveying.

Land is or should be described by designating a permanent and accessible starting-point, which may be easily found. A well-defined starting-*point*, in its strict sense, is not a well-defined object, but some particular *point* on that object, as a cross or crowfoot on a rock or a metal plate, or a metallic plug inserted or securely fastened in a hole, or the center of a monument, be it a tree, stump, wall, or other natural or artificial object. This starting-point should be permanent, fixed, and indestructible, and it should be accessible for all the purposes of surveying, and adapted to the uses of ordinary surveying instruments. It should be a point at which the end of a tape can be held and over which a surveying instrument can be placed; and if the survey has to do with levels, it should be a point upon which a leveling-rod can be placed. It should be high and dry, that it shall neither be flooded with water nor subject to the action of frost and ice. It should not be in places of public travel where, if occupied, it will interfere with the rights of the public.

Probably no feature of a description of land is more unsatisfactory to a surveyor than the starting-point. Without a starting-point, properly defined and designated, a description is of little use to a surveyor or to any one else, for if the description fails to define the extent and locality of the land it conveys, then it is invalid as a conveyance and no estate will pass by the deed.

368. Boundaries Established by Law.—When land has been acquired by eminent domain, by prescription, or by adverse possession, a determination of the boundaries is a mixed question of law and fact, and is determined by the circumstances and conditions existing, which are subjects of proof by the parties. For convenience, boundaries determined in this manner have been designated as those determined by law, because they depend upon the decisions of the court and the application of the statutes of the different states. When land has been acquired by eminent domain its extent is frequently determined by the statute which gave the powers of eminent domain to the company exercising such powers; and when the extent of land taken has not been designated, it is usually provided in the statute that it shall be designated and defined in the certain manner described, which must be exercised strictly in accordance with the terms of the statute. Land acquired by adverse possession will be limited to that actually possessed and occupied for the full period of the statute of limitations. As to just what may be included in such possession and occupation is a matter of law determined by statutes and the decisions of each state, which are discussed in another part of this book.* Boundaries may also be established by the acts of the owners of

* *See* Secs. 511–540 and 671–700, *infra.*

adjoining estates, either by arbitration or by acquiescence and agreement upon the line dividing or separating the lands. The determination of these questions is also a matter of law.*

369. Boundaries Described by Natural Objects.—Boundaries are usually defined or designated by monuments. They may be either natural or artificial. The term monument as ordinarily applied is not a boundary, but a point or object in the line of the boundary; this, however, is merely a technical interpretation of the word. A monument may be a stream, or the dividing-line of a watershed, a fence, or a ledge of rocks, and as such it may constitute the boundary of an estate or tract of land. Natural objects used as monuments include streams, mountains, hills, rocks, trees, stumps, hedges, and other natural features frequently found upon land, and these are most frequently used in the description of estates; but they are not for that reason to be considered the best. A stream is not fixed, and its location may vary many feet from year to year. A mountain or hill is a very indefinite object, and as a means of locating a definite line is utterly useless unless it be used as a far-distant object, merely to give the direction of the line. Trees, marked or described, are the most common objects used to determine the limits of a tract of land, and they are in many localities the best monuments to be found. Hedges are quite as good when consisting of full-growth trees set in a straight line and sufficiently described. Usually when such natural objects are described as monuments the center of such objects is taken as the starting-point, or point through which or to which the boundary-line is carried or measured.†

370. Boundaries Described by Artificial Monuments.—Artificial monuments include structures erected by man, either expressly for the purpose of designating points in the boundary or for other purposes, and utilized to describe the limits of an estate. The former class includes stone monuments, steel rods, or pipes, and the common "stake and stones," also structures erected for inclosures, such as fences, walls, and curbs. The latter class includes buildings, bridges, dams, and other structures, such as embankments, levees, and sea-walls. For permanency and accessibility the ideal monument is an artificial monument. If properly erected, it is in every respect better and more satisfactory to surveyors, and is less likely than a natural monument to lead to disagreements and controversies between the owners of adjoining estates. If misplaced or destroyed, it is more ordinarily subject to detection and may be more certainly restored and fixed. It may or may not be destroyed or misplaced; but it is certain that most forms of natural monuments are perishable and movable. Natural rocks in most localities are moved by frost and water, streams are constantly subject to lateral movement, trees decay and are destroyed, and hedges are subject to lateral growth, which make the line indeterminate. Artificial monuments are usually placed

* *See* Secs. 491–510, *infra*. † *See* Secs. 602–606, *infra*.

in fields or on elevations which are least subject to destructive influences, and they may be further protected by suitable drainage and by such artificial treatment as shall make them practically imperishable. A wall may crumble and decay, but, if of considerable length, enough will remain to determine definitely a boundary-line. An iron pipe filled with cement may rust, but the cement will remain practically imperishable. A stake may rot, but the stones piled around it will be enduring witnesses to its location. For these reasons, and because of the additional fact that such artificial monuments are easily accessible, they are to be preferred in almost all instances.

A monument may be a combination, natural and artificial, as in the case of a copper plug inserted into a hole drilled into a rock. The rock is a natural monument, and the copper plug is an artificial monument designating the precise point of the line or angle of the survey. A tree or several trees may witness the location of an artificial monument if the distances and directions from the former be known. Such a combination monument in which natural objects are used as witnesses, while the actual point is an artificial object which is easily accessible to persons and instruments, represents the ideal monument in a survey. If the artificial monument be destroyed or misplaced, the natural object affords a witness by which it can be relocated, and the point where the artificial monument was placed will afford a good station for surveying instruments when it becomes necessary to relocate the land at the lines of the survey. A tree, wall, hedge, or rock is anything but a desirable monument when it is required to do instrumental work. The work in getting around such monuments increases the labor and expense of relocating the land, and they are an unnecessary source of annoyance to a surveyor.

CHAPTER XXI.

BOUNDARIES ON WATERS. SHIFTING CHARACTER. ACCRETION, EROSION, RELICTION, AND RECLAMATION.

371. Boundaries Described by Natural Bodies of Waters. — Natural bodies of water and streams are very often designated as boundaries or dividing-lines of estates. Water is of inestimable value to land. For purposes of husbandry, manufacture, and commerce its uses are manifold. Lands without streams or bodies of water are barren and unproductive and of little use or value. We therefore find that when land is subdivided both the grantor and the grantee seek to retain to their respective estates the water-rights which are to be had, and the most convenient or natural way to secure them is to make the center of the stream the dividing-line, thus dividing its uses and benefits between the adjoining owners.

The benefits thus secured to the estates are considered of such great value to their owners as to offset any losses and damages incident to the unstable character of a living boundary, for, however much a stream may encroach, and however destructive its action upon the land, generally its inherent value will outweigh the damages resulting.

372. Boundaries Defined by the Sea are Not Fixed and Permanent.—A boundary upon the sea is not a fixed and established line, but is one that is subject to constant change, the encroachments of the sea upon the land, and the accretions that may be gained, rendering it in almost every case ever-changing. The generally poor and unproductive character of low beaches and shores where disputes would arise renders the question of an accurate determination unnecessary as a rule; but at popular resorts on beaches, and in cities where docks and wharves are constructed, it at times becomes important. A boundary located with the most extreme care might be changed by the first storm and heavy sea.

By the common law, if by slow, gradual, and imperceptible degrees soil and matter be cast up, deposited, and settled, and land thus slowly and imperceptibly made, it belongs to the shore-owner. The law is a just one whether the result of custom or of privilege or of a presumed law. Such lands being barren and unproductive are of no value generally to the government

or to any one else. The adjoining owner acquires title to them on the same principle by which all titles to lands have been originally acquired, viz., by occupation and improvement. A narrow strip of land, almost imperceptible in breadth, barren, and constantly liable to inundation, would remain perhaps forever barren and uncultivated but for this law. It is the labor of the person who occupies it, who perhaps makes it secure by embankments, who by cultivation and protection renders it productive, that gives it value. The original deposit constitutes not a tenth part of its value; the other nine-tenths are created by the person who has occupied it, and, in the words of Locke, "The fruits of his labor cannot without injury be taken from him." Furthermore, the land so acquired is but a reasonable compensation for losses that frequently happen from inundation and encroachments by the sea upon the land, and which these owners must suffer.[1]*

373. Beaches, Shores, and Banks as Boundaries.—By these terms is understood the space between high- and low-water mark.[2] The words are synonymous, and with reference to the sea belong to that portion of the land which is alternately covered and left bare by the flux and reflux of the tide.[3] This definition is not inflexible.[4] A devise or grant of a beach for driftwood will not include land covered by extraordinary inundations, but is limited to the high-tide marks of ordinary seasons.[5]

The term *strand* is synonymous with *shore*, and is that portion of the land lying between ordinary high- and low-water marks.[6]

The bank of a stream has been held to be the elevations of land which confine the waters in their natural channel when they rise to the highest and do not overflow the banks, and not the low-water mark to which the waters recede at their lowest stage.[7]

374. The High- and Low-water Mark.—The expression "water-mark" has been held to mean the line in which the surface of the water ordinarily intersects the bank at high or low tide.[8] The low-water mark has been held to be the mark to which the tide at its ebb usually flows. The point or line to which the tide might ebb under an extraordinary combination of influences will not form the boundary of the beach-owner, or enable the owner of flats to ascertain satisfactorily the extent which he owns. Much less would other persons employed in the business of commerce and navigation be able to

[1] Gifford *v.* Yarborough, 5 Bing. 163; St. Louis *v.* Mo. Pac. Ry. Co. (Mo. Sup.), 21 S. W. Rep. 202.

[2] Cutts *v.* Hussy, 15 Me. 241; Dana *v.* Jackson St. Wh. Co., 31 Cal. 118 [1866].

[3] Littlefield *v.* Littlefield, 28 Me. 184; Starr *v.* Child, 20 Wend. 149.

[4] Merwin *v.* Wheeler, 41 Conn. 14.

[5] Brown *v.* Lakeman (Mass.), 17 Pick. 447.

[6] Stillman *v.* Burfeind (N. Y.), 21 App. Div. 13.

[7] People *v.* Bd. of Supervisors, 125 Ill. 9 [1888]; Paine Lumber Co. *v.* United States (C. C.), 55 Fed. Rep. 854. *But see* Halsey *v.* McCormick, 13 N. Y. 296, which held "to the bank of a stream" to carry the grantee to low water. *And see* Hess *v.* Cheney (Ala.), 3 So. Rep. 791 [1888].

[8] Gerrish *v.* Union Wharf Co., 26 Me. 395.

* *See* Secs. 376–384, *infra* (Accretions).

ascertain with ease and accuracy whether they are encroaching upon private rights or not by sinking a pier or placing a monument. It is reasonable that high- and low-water marks should be ascertained by the same rule. The place to which tides ordinarily flow at high water becomes a well-defined line or mark which at all times can be ascertained without difficulty. If the boundaries of land were extended to that place to which the lowest deep tides flowed, no certain mark or boundary could be determined. The same would hold if the high-water mark were regarded as that line to which the highest spring tides might flow. The best authorities therefore hold that the laws have reference to the ordinary high- and low-water marks; that a line or boundary at low-water mark becomes known and can be satisfactorily proved, and that when once ascertained it will remain permanently established.[1]

The high-water mark has been held, as between the riparian proprietors and the public, to be the limit of the river-bed, and the river-bed has been held to be the land which the river occupies long enough to destroy the vegetation and to destroy its value for agricultural purposes.[2]

On the Mississippi River in Iowa the high-water mark has been held to be only the edge of the bank, and not to be the highest point to which the river ordinarily rises in times of high water; and the river-bank is said to be that portion of the earth which confines the water in its channel, which bank in case of navigable streams is in some states held to belong to the public. These banks are frequently overflowed in times of freshet, but in determining the boundary-line between the banks and the bed of the stream freshets are not to be considered.[3]

A grant of a right to flood land to the high-water mark of a dam or pond has been held not to give a right to raise the dam above the designated mark, and to require that the dam be so maintained that the water will not rise above the mark in the ordinary state of the stream.[4] The high-water mark was held to mean the highest point to which the dam will raise the water in the ordinary state of the stream.[5]

High-water mark in respect to fresh-water rivers seems to be undefined and quite uncertain. It may mean any stage of the water above its ordinary height, and the line will change with every freshet or flood that may happen.[6]

The owner of land bordering upon waters where the tide ebbs and flows, or upon inland unnavigable waters where the tide does not ebb and flow, has a legal right to possess and occupy the land between high- and low-water mark, subject to a right of the state to take the land for its own use, or to

[1] Gerrish *v.* Union Wharf Co., 26 Me. 395; *Ex parte* Jennings, 6 Cow. (N. Y.) 536; Storer *v.* Freeman, 6 Mass. 435, Com. *v.* Charlestown (Mass.), 1 Pick. 180.

[2] Houghton *v.* Chicago, etc., R. Co., 47 Ia. 370 [1877].

[3] *See* 29 Amer. & Eng. Ency. Law 826.

[4] Brady *v.* Blackington, 113 Mass. 245.

[5] Winkley *v.* Salisbury Mfg. Co. (Mass.), 14 Gray 443.

[6] Howard *v.* Ingersoll, 13 How. (U. S.) 423.

authorize it to be taken by a corporation for public use, and also subject to the right of the public to use it in aid of navigation. Such an owner may maintain ejectment against an intruder upon lands along, partly above and partly below high-water mark. [1]

Low-water mark is the point to which the river recedes at its lowest stage. High-water mark is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.[2] Low-water mark on the shore of a lake, as a boundary, is ordinary low-water mark, or the level at which the water stands when free from disturbing causes.[3]

A river, therefore, in which the tide does not ebb and flow has no shores in the legal sense of the term. It has *ripas*, but no *litores*. The word banks is more properly employed, when speaking of rivers or streams, to designate the land between the margin of the water of the stream at low-water mark and at high-water mark.[4] While the banks are a part of the river, the river does not include lands beyond the banks which are covered in times of freshet or extreme floods, or swamps or low grounds which are liable to overflow but are reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture.[5]

The bed of a river is a definite, and commonly a permanent, channel, and is the characteristic which distinguishes the water of the river from mere surface drainage, and from water percolating through the strata of the earth.[5] To better understand the law of boundaries on banks and shores, a brief survey of the law in respect to the property in beaches will be necessary.

375. Property in Beaches, Shores, and Banks.—The law of boundaries on beaches and shores does not differ materially from the law of boundaries on other waters and ways, except where modified by the common law, by early English customs, and by restrictions required by the crown or the government. The control of the sea and its shores, of bays and navigable streams, and of large lakes and ponds, is retained by the crown or state, that it may defend its coasts, promote commerce, and encourage the growth and development of its cities and manufactories. Fortifications must be erected to protect it from invasion; lights constructed to assist navigation and promote commerce; harbors must be deepened and inclosed, and made secure for shipping; natural streams deepened and protected for transportation of crops and other products from the interior; great lakes and ponds diverted into vast systems of water-supply for agricultural, manufacturing, and domestic purposes.

[1] Sisson *v.* Cummings, 35 Hun 22, 106 N. Y. 56.
[2] Paine Lumber Co. *v.* United States (C. C.), 55 Fed. Rep. 854.
[3] Slauson *v.* Goodrich Transp. Co. (Wis.), 69 N. W. Rep. 990.
[4] Starr *v.* Child, 20 Wend. 149.
[5] Paine Lumber Co. *v.* United States (C. C.), 55 Fed. Rep. 854.

The government must have free access and exclusive control of these important natural features of its domain. Delays and restrictions might bring disaster and ruin to the country, and it is for these probable reasons that we find, at common law, the sea, the shore, and all navigable streams, and the soil beneath them, declared to be the king's. The same necessity requires our own republican government to maintain the same rights that the common law has bequeathed to it. It may therefore be expected that the boundaries of these features will be restricted to such limits as shall not encroach, encumber, or restrain the free public use and enjoyment of such property. We therefore find that the law of boundaries upon bodies of water that are navigable, or of such extent as to be of great public benefit, is different from that upon smaller and less important streams and bodies of water.

This property is not directly vested in the Federal Government; but generally the state is the exclusive proprietor and owner of all the soil upon its maritime borders ordinarily washed by the tides, subject to any lawful grants of the soil by the state or by the sovereign power which governed its territory before the declaration of independence.[1]

376. Beaches and Shores Described as Boundaries.—At common law the sea that flows around our coasts and all the land to which no individual has acquired a right by occupation and improvement belongs to the sovereign power, the government.[2] The boundary of land on a common-law navigable stream, i.e., one in which the tide ebbs and flows, is the high-water mark on the shore.[3]

As Mr. Tyler in his book on Boundaries concludes, after an able discussion of the authorities on this subject: "It is the settled principle in the laws of this country and of England that exclusive rights of owners of land bounded by the sea, or, which is the same, on navigable rivers where the tide ebbs and flows, extend only to high-water mark, and that the shore below common, but not extraordinary, high-water mark belongs to the state as trustee for the public. In England the *crown*, and in this country *the people*, have the absolute proprietary interest in the shore of these waters, though it may by grant or prescription become private property. The grantee of such shore does not take a fixed freehold, but one that shifts as the shore recedes or advances.[4] Whether the sovereign power of the state can grant to individuals a freehold interest in such shore and submerged soil is a question. Franchises for the enjoyment of fishing, wrecking, ferries, and mining are frequent, but to enjoy these does not require an absolute ownership of the soil.[5] They are held by this sovereign power for the erection of public defenses and for the uses of navigation, and for the benefit and enjoyment of the public, as for fishing, bathing, etc.[6]

[1] Tyler on Boundaries, 32.

[2] Gifford *v.* Yarborough (Eng.), 5 Bing. 163 [1828].

[3] 2 Amer. & Eng. Ency. Law 504; De Lancey *v.* Piepgras (Sup.), 17 N. Y. Supp. 681; Stillman *v.* Burfeind (N. Y.), 21 App. Div. 13.

[4] Tyler's Law of Boundaries 39, 40.

[5] *See* Tyler on Boundaries 36–40.

[6] *See* Angel on Tide-waters 158.

In Oregon it has been held that the title to land over which the tide ebbs and flows is in the state, and a conveyance thereof vests the absolute title in the grantee.[1]

In Maine by statute and in Massachusetts by statute (1647) it is the low-water mark that bounds shore-owners. Therefore, calls in a deed which describe a parcel of land on the seashore as running "to the water," and thence "by the water," carry the grant to low-water mark.[2] The title of an owner of uplands in the adjoining flats extends, under the Massachusetts Colony ordinance of 1647, where the tide ebbs and flows less than 100 rods to the extreme low-water mark.[3] In Louisiana the land between the levee and the river, though submerged at the high stage of the river, is the property of the riparian proprietor, subject to public uses.[4] In New York state on the Harlem River a description of a tract of land naming the river as its boundary does not necessarily include land lying between high- and low-water mark on said river.[5]

377. Streams and Rivers as Boundaries. Effects of Erosion and Accretion.*—The shifting character of boundaries is not confined to large bodies of water, but is equally characteristic of streams, both large and small. The crooked sinuosities of natural streams make them subject to side currents and consequent eddies that are constantly washing away soil in one place and depositing it in another. The scouring and carrying power of water is little appreciated by persons who do not belong to the scientific professions. If one consider that the erosion of water increases as the square of the velocity, and that the transporting energy increases as the sixth power of the velocity of the current of the stream, he will better appreciate its destructive influence. A simple illustration will explain its power to the untutored. If the ordinary flow of a stream be two miles an hour and in times of flood it be increased to six miles, its power of erosion becomes twice as great and its power of transportation becomes seven hundred and twenty-nine times what it was at two miles an hour.

This erosion is usually accompanied by accretion to the opposite side of the stream, and by the continued action of the water the stream encroaches upon one side and recedes from the other. This sidewise movement, though slow and imperceptible for a day, may amount to considerable in a year, and to many hundred feet in a century. In fact, the fertile flats of most valleys are the result of this action of streams. If a stream is described as a

[1] Bowlby *v.* Shively (Or.), 30 Pac. Rep. 154–160.

[2] Babson *v.* Taintor (Me.), 10 Atl. Rep. 63 [1887]; Sewall Cord Co. *v.* Boston W. P. Co. (Mass.), 16 N. E. Rep. 782, 147 Mass. 61 [1888]. As to what is low-water mark, *see* Tappan *v.* Boston W. P. Co. (Mass.), 31 N. E. Rep. 703.

[3] Sewall Cord Co. *v.* Boston W. P. Co., 147 Mass. 61 [1888].

[4] Mathis *v.* Board of Assessors (La.), 16 So. Rep. 454.

[5] Jarvis *v.* Lynch (Sup.), 36 N. Y. Supp. 220.

* *See* Sec. 372, *supra*.

boundary, that boundary is shifting and will follow any gradual and imperceptible movement of the stream, whether of recession or of encroachment of the water. This is equally true whether the stream be navigable or non-navigable, or whether such movement be solely due to natural causes, or to such causes influenced and assisted by artificial works.[1]

Strictly, *accretion* is the process of gradual and imperceptible increase of land caused by the deposit of earth, sand, or sediment thereon by contiguous waters. The increase should be so gradual that one cannot judge how much is added in one moment of time. *Alluvion* is the addition made to land by the washing of the sea or a navigable river or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added in any moment of time. Alluvion comprises soil and other things, such as marine and water plants, seaweed, etc., which are washed up on the shores of the stream by the action of water. In determining the law of accretion it does not matter whether the waters be navigable or unnavigable, fresh or salt, or whether they be affected by tide or current. Such questions as to whether they are navigable, salt, or affected by the tide are considered only in determining the ownership of the shores, bed, or bottom of streams. Some authors have stated that the accretion or alluvion must be the result of the natural action of the water; but this is not the law in general, for it is now pretty well settled that the addition by water and alluvion may be due to the combined influence of natural and artificial causes.[2]

The increase or accretion must be slow and imperceptible; and the test as to whether an addition is gradual and imperceptible is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while it was going on.[3] In all cases of gradual accretion which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs to which the accretion is added.[4]

In this country, on swiftly flowing streams, especially in times of flood, the laws of accretion apply even when the change made by the force of the current can be noticed while it is going on.[5] The law of accretion applies to the Missouri River notwithstanding that, owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers.[6] Where the middle of a stream is the boundary-line of land, and the water undermines the bank, and the soil caves in and mixes with the water and is washed away, the owner must stand the loss; and the middle of the new channel will be the boundary.[7] The fact that rapid

[1] 1 Amer. & Eng. Ency. Law 137; Denny *v.* Cotton (Tex.), 22 S. W. Rep. 122.

[2] 1 Amer. & Eng. Ency. Law (2d ed.) 467–468.

[3] County of St. C. *v.* Livingston, 23 Wall. 46. Mulry *v.* Norton, 100 N. Y. 424 [1885].

[4] Matter of Hall & Selby Ry., 5 M. & W. 327.

[5] Denny *v.* Cotton (Tex.), 22 S. W. Rep. 122.

[6] Nebraska *v.* Iowa, 12 Sup. Ct. Rep. 396.

[7] Bouvier *v.* Stricklett (Neb.), 59 N. W. Rep. 550.

changes in the banks of the Missouri River are constantly going on, and that forty acres of land have been added to an adjoining tract, will not overthrow an averment that the increased territory was due to accretion, and that it was by an imperceptible increase when it was twenty years in forming.[1]

The laws of accretion are so firmly established that it is followed in all cases and gives rise to some curious problems. If land be owned by A, B, and C, as shown in Fig. *a*, and the stream be named as the boundary between B and C, and the stream encroaches upon B until B's land is entirely worn away and then the stream subsequently works its way back to its former place, the question arises as to who owns the original estate of B. It is contended that C would own it.[2]

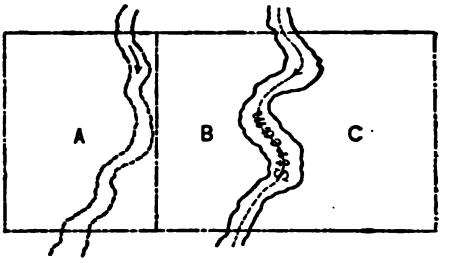


FIG. *a*.

If the sea slowly recedes or the land is gradually elevated, the same principle applies, and the land belongs to the proprietor to whose land the gain is made;[3] and where the sea, instead of retreating, encroaches upon the land, the property gradually submerged belongs to the state.[4]

378. Accretions go to Riparian Owners.—The title to alluvion vests exclusively in riparian proprietors.[5] To claim title to accretions as such, there must be actual contiguity; any separation of the claimant's land from the alluvion by the land of another will defeat his claim.[6] To be a riparian owner, his land must touch the shore of the lake or stream,[7] or he must own the bed of the stream or body of water in which the alluvion is deposited.[8]

Where land which formerly fronted upon a river was conveyed by deed by its section number, it passed title to any land which had been added thereto by accretion.[9] When described by lot number, referring to the official plot of the government survey, it passes all accretions to the lot up to the date of the conveyance.[10]

[1] East Omaha Ld. Co. *v.* Jeffries, 40 Fed. Rep. 386.

[2] Price *v.* Hallett (Mo.), 38 S. W. Rep. 451; Welles *v.* Bailey (Conn.), 10 Atl. Rep. 565 [1887].

[3] 1 Amer. & Eng. Ency. Law 137, *and cases cited.*

[4] Wilson *v.* Shiveley, 11 Oregon 215.

[5] State *v.* Buck (La.), 15 So. Rep. 531.

[6] 1 Amer. & Eng. Ency. Law 138, *and cases cited.*

[7] Stark *v.* Miller (Mich.), 71 N. W. Rep. 876; *semble*, Mulry *v.* Norton, 100 N. Y. 424. *See* Chamberlain *v.* Hemingway, 63 Conn. 1.

[8] On this subject of rights to land made by or resulting from accretions, reliction, and avulsion, see 45 Cent. Law Jour. 148.

[9] Tappendorf *v.* Downing (Cal.), 18 Pac. Rep. 247 [1888].

[10] Jeffries *v.* E. Omaha Ld. Co., 10 Sup. Ct. Rep. 518.

By Revised Statutes of the United States, § 2396, it is provided that in those portions of a fractional township where intermediate or interior corners have not been fixed the boundary-lines shall be ascertained by running from the established corners to a watercourse, etc. In construing this statute it was held that, in surveying a lot bordering on a river, the watercourse became the boundary, and continued so no matter how much it shifted by accretion, and that a conveyance of the lot passed title to all land accreted to such lot.[1] Whether or not accretions to land of one of two adjoining riparian owners and which gradually extends in front of the land of the other (Fig. *b*) belongs to the former, to whose land it is added, depends largely upon whether it be a navigable or a non-navigable stream, i.e., whether the bed of the stream belongs to the riparian owners or to the state or to the public. If the bed belong to the state or the public, then the accreted land will belong to the riparian owner to whose land it is added.[2]*

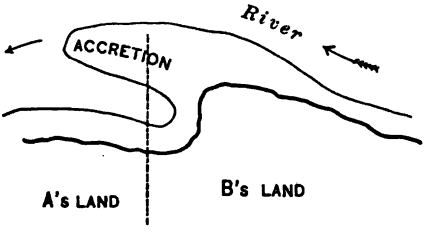


FIG. *b*.

When, therefore, land on a navigable stream was gradually and imperceptibly washed away, and the place where it had been remained for many years the bed of the river, the riparian owner does not acquire title by accretion to new land subsequently formed within his original boundaries, unless its formation began at high-water mark.[3] He cannot claim, as accretion, land beyond a well-defined slough, 40 to 60 yards wide, which was the old channel of the river, and through which water runs at certain seasons deep enough for navigation.[4] Lands made and formed between the shore line and the main channel, whether such lands consisted of gradual accretions or islands formed in the river, do not always belong to a riparian owner because they become attached to his shore line.[5]

If the land were an island formed in the Missouri River, and the river channel ran permanently between said island and plaintiff's land as it was originally surveyed by the government, and afterwards said channel was filled up by overflow and deposit of sand and mud, so that the mainland and said island became united, the island would not be an accretion to plaintiff's land.[6]

[1] East Omaha Ld. Co. *v.* Jeffries, 40 Fed. Rep. 386.
[2] Crandall *v.* Allen (Mo. Sup.), 24 S. W. Rep. 172; Minton *v.* Steele (Mo.), 28 S. W. Rep. 746.
[3] Wallace *v.* Driver (Ark.), 33 S. W. Rep. 641.
[4] Crandall *v.* Smith (Mo. Sup.), 36 S. W. Rep. 612.
[5] Hahn *v.* Dawson (Mo. Sup.), 36 S. W. Rep. 233.
[6] Hahn *v.* Dawson (Mo. Sup.), 36 S. W. Rep. 233.

* *See* Secs 424–426, *infra*.

An island in a lake which existed as such prior to an early survey by the government, but which was not then platted, and which by process of accretion has become joined by a spit to the neighboring lot, is not a portion of that lot.[1]

However, when land was bounded by a stream in which was a sand-bar covered during the greater part of the year with water, this alluvion sand-bar was held to belong to the riparian owner even though the distance from the bar across the water to the land was half a mile when it was uncovered, and that the government surveyor in running the lines of the bank did not survey it.[2] This case must be explained by the fact that the riparian owner was regarded as the owner of the bed of the stream, which is in accord with the civil law.

The party claiming the accretion must have been the owner of the land when the suit was begun, and the land sued for, or some part of it, must have been formed onto and against the lands owned by plaintiff by the deposit of sand and mud.[3]

An unauthorized agreement by the lessees of one riparian owner with the adjoining riparian owner as to the division-line between the holdings in the shallow waters of a navigable bay is void.[4] A lease of accretions by the lessor in a former lease to another of land bounded by the bank of a river, executed after the first lease and before a grant in fee to the lessee therein, does not give the second lessee a reversion in the accretions, but the fee therein vests in the first lessee under his grant.[5] A lease for 99 years of land described as bounded by the bank of a river includes future accretions.[6]

379. Accretions to Public Streets and Ways.—Accretions to a public highway or land reserved for public use partakes of the same nature, and the city holds title to it subject to the same uses and conditions. The title to it may not be granted to a railroad company, though a right of way may be.[7] Accretions at the foot or end of a street are considered a continuation of the street, and adjoining owners cannot close up the space between the river and the end of the street, although by statute they can erect piers and bulwarks.[8]

In Minnesota the rule that abutting owners take to the center of a highway does not seem to hold where there is no abutting owner on the opposite side of the way, as where the road runs along the shore of a navigable lake. Where occupants of government lands had caused the same to be platted as a town

[1] Bigelow *v.* ——— (Ia.), 52 N. W. Rep. 124.

[2] Stephenson *v.* Goff (La.), 10 Rob. 99. *But see* 63 Tex. 330, *and* Railroad Company *v.* Schurmer, 7 Wall. 272 [1868].

[3] Hahn *v.* Dawson (Mo. Sup.), 36 S. W. Rep. 233.

[4] Northern Pine-land Co. *v.* Bigelow (Wis.), 54 N. W. Rep. 496.

[5] Haps *v.* Hewitt, 97 Ill. 498; Rutz *v.* Kehr (Ill. Sup.), 29 N. E. Rep. 553.

[6] Cobb *v.* Lavalle, 89 Ill. 331; Rutz *v.* Kehr (Ill. Sup.), 29 N. E. Rep. 553.

[7] Cook *v.* City of Burlington, 30 Iowa 94; St. Louis *v.* Mo. Pac. Ry. Co. (Mo.), 21 S. W. Rep. 202. *And see* Godfrey *v.* Altoona, 12 Ill. 29.

[8] People *v.* Lambier, 5 Denio (N. Y.) 9; Steers *v.* Brooklyn, 101 N. Y. 51. *And see* 1 Amer. & Eng. Ency. Law 139.

site, with a street along the shore of a navigable lake, and a lot fronting upon the street before mentioned had been conveyed, describing the same in accordance with the town plat, it was held that the fee title to the entire street to low-water mark, including all riparian rights, passed to the grantee, and that on a conveyance by him by the same description it passed to his grantee.[1] The soil of public roads belongs to the owner of the land on which they are made; and in case of roads bordering navigable streams, that ownership is unimpaired except to the extent of the servitude imposed by law, which confines the servitude to uses and works of a public character.[2]

The Missouri courts have held differently, and that the owner of a city lot bounded on one side by a street which is located along a river is not entitled, as a riparian proprietor, to land formed by accretions on the opposite side of the street.[3]

Where a riparian owner has dedicated a highway along a river to the public and has not reserved a strip between the highway and the river, the accretions will become public and be subject to public uses. If the strip were marked on the plan "Quay" or "Dock," or there were other words showing an intent to dedicate it to the public, that fact would defeat the proprietor's claims to accretions.[4]

380. Ownership of Land Re-formed upon a Site Washed Away.—If land be washed away and then re-formed upon the same subsoil, it belongs to the former owner if he can re-establish his old boundaries; but if an island has been washed away and accretions are deposited to and against the mainland, then they belong to the proprietor of the mainland and cannot be claimed by the former proprietor of the island over whose site they are formed.[5]* If the mainland has been carried away and an island has been formed over the original site of the mainland, it belongs to the owner of the former site, though the mainland was a fractional part of a section.[6]

The title to land that is overflowed and subsequently reappears remains in the original owner, if the original boundaries can be identified, no matter how long it may have been submerged. The same is held of an island that has disappeared and afterwards reappears. For a proprietor to lose his title to land by erosion or submergence the land must be transported beyond the owner's boundary.[7] This is true even when the land is washed away by a sudden and

[1] Wait *v.* May (Minn.), 51 N. W. Rep. 471; Municipality *v.* Cotton Press, 18 La. 122; 1 Amer. & Eng. Ency. Law 139.

[2] Bradley *v.* Pharr (La.), 12 So. Rep. 618.

[3] Lebeaume *v.* Poctlington, 21 Mo. 36; Smith *v.* Public Schools, 30 Mo. 294; Ellinger *v.* Missouri Pac. Ry. Co. (Mo. Sup.), 20 S. W. Rep. 800. *But see a Louisiana case*—Succession of Delachaise *v.* Maginnis (La.), 11 So. Rep. 715.

[4] Municipality *v.* Cotton Press, 18 La. 122; Wetmore *v.* Atlantic, etc., Co., 37 Barb. 70; Banks *v.* Ogden, 2 Wall. 57.

[5] Buse *v.* Russell, 86 Mo. 209.

[6] Cox *v.* Arnold (Mo.), 31 S. W. Rep. 592.

[7] Mulry *v.* Norton, 100 N. Y. 424 [1885]; Minton *v.* Steele (Mo. Sup.), 28 S. W. Rep. 746.

* *See* Sec. 377, p. 254, diagram, *supra*.

perceptible process.[1] The fact that land is not first made on the shore or bank is not material to the title of the adjacent owner, provided that the deposits ultimately blend with the adjacent land by the action of the river.[2]

When a portion of defendant's land was washed away, and afterwards the land was re-formed within the limits of such land, the land so formed does not become the land of defendant if it consist of accretions to plaintiff's land. Such accretions belong to plaintiff if they began upon his land.[3]

Where the lands of original adjoining upland owners P and D became submerged by a change in the bed of the river (Fig. *c*), after which the river receded from P's land and encroached on the land of D until it passed the original boundary, it was held that by the submersion the original line ceased to exist, and P became a riparian owner, with all the accompanying rights of accretion and reliction.

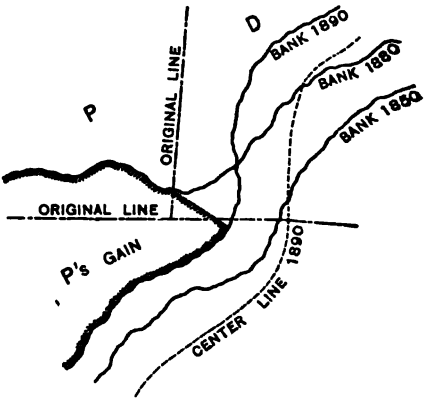


FIG. *c*.

Whether the river was navigable or non-navigable, P was held entitled to all accretion to his land, though it extended in the first case beyond the original high-water mark, or in the second case beyond the original center of the stream. Even though a portion of P's original lot last submerged was formerly an upland corner, it was held that his rights to accretion were not limited to his original boundaries, but included all accretions within lines drawn from the termini of his upland boundaries, at right angles with the general course of the stream, although it was thus made to include land originally belonging to D.[4]

Whether or not land formed in the changing bed of a river is an accretion to a tract formerly on the shore of a river, or whether it is newly made land unattached thereto, is a question for the jury.[5]

381. Accretions to Lands upon Lakes, Ponds, and Harbors.—The same rules of accretion and reliction apply to lands upon natural lakes and ponds, and for the same reasons, unless the description shows an express intention to the contrary. Owners of land upon lakes, whether navigable or not, have title to land left dry by the gradual and imperceptible recession of the waters.[6] An

[1] Wallace *v.* Driver (Ark.), 33 S. W. Rep. 641.
[2] Minton *v.* Steele (Mo. Sup.), 28 S. W. Rep. 746.
[3] Naylor *v.* Cox (Mo. Sup.), 21 S. W. Rep. 589; Price *v.* Hallett (Mo. Sup.), 38 S. W. Rep. 451.
[4] Welles *v.* Bailey (Conn.), 10 Atl. Rep. 565 [1887]; Price *v.* Hallett (Mo. Sup.), 38 S. W. Rep. 451.
[5] Price *v.* Hallett (Mo.), 38 S. W. Rep. 451; Bennett *v.* Nat. Starch Co. (Iowa), 72 N. W. Rep. 507, *deposits from sewers*.
[6] 1 Amer. & Eng. Ency. Law 137.

exception has been made in Louisiana in the case of Lake Pontchartrain, where it was held that accretions belonged only to lands adjacent to streams and rivers. This is not the universal law, and is believed to be the only exception to the general rule.[1] Land reclaimed from the water of a harbor comes within the same rule and belongs to the owner of the adjoining property.[2]

Property rights in accretions depend upon the common-law right, for reasons before stated; and for the further reason that a stream, beach, lake, or pond is of so great benefit and value to an estate that encroachments upon one owner and consequent loss of land are regarded by the law as trifling, compared to the loss of a stream or body of water. Hence the rule that a proprietor follows the water however much it recedes or changes, if it be gradual and by imperceptible degrees. He is not, therefore, to be deprived of it because the land has been added by artificial means. This is true if the land is added by filling, and the title to the land so filled and acquired is not from any grantor, but directly from the state.[3] Where harbor lines and limits have been established by the state, it gives an implied permission to all coterminous owners to fill out to such line, but no further.[4] It seems from the same cases that natural accretion is limited to the harbor-line. This, when established, defines the line of navigation of the river, and fixes the limit out to which the riparian owners may erect wharves, docks, and other proper structures, and is binding upon the court in apportioning the water front among the parties entitled thereto.[5]

A riparian owner cannot acquire title to land in his front, under the waters of a navigable river and below high-water mark, by filling up and displacing the water with soil from his land.[6] Land made by filling in the space between high- and low-water mark, under the right of the city of New York to improve the tideway for the benefit of commerce, does not become the property of the riparian proprietor, as an accretion, but remains, as dry land, the property of the city, under its grants, as much as when it was still land under water.[7] *

In the city of San Francisco the owner of a lot upon the water front of the bay has been held not a riparian owner in the sense in which that word is used in the law of tide-waters, because the water front of San Francisco was created by a statute. The owner, therefore, of such a lot has no right to enter

[1] Zeller *v.* Southern Yacht Club, 34 La. Ann. 837. *See* Municipality *v.* Cotton Press, 18 La. Rep. 122.

[2] Lockwood *v.* N. Y. & H. Ry. Co., 37 Conn. 387.

[3] Bailey *v.* Burges, 11 R. I. 330 [1877].

[4] Engs *v.* Peckham, 11 R. I. 290 [1877]; Bradshaw *v.* Duluth Mill Co. (Minn.), 53 N. W. Rep. 1066; Bailey *v.* Burgess, 11 R. I. 330; Dana *v.* Jackson St. Wharf Co., 31 Cal. 118.

[5] Groner *v.* Foster (Va.), 27 S. E. Rep. 493. *See* Welch *v.* Oregon Ry. & Nav. Co. (Oreg.), 56 Pac. Rep. 417 [1899].

[6] Saunders *v.* New York Cent. & H. R. R. Co. (N. Y. App.), 38 N. E. Rep. 992.

[7] Sage *v.* City of New York, 154 N. Y. 61. Many grants in New York State are governed by the Law of Netherlands.

* *See* Sec. 401, *infra*.

on the increase of land by accretion or alluvion to the exclusion of the state, nor can he maintain ejectment against a stranger.[1]

Land outside of the harbor-lines is under navigable water and belongs to the state. Where one, without right, enters on and fills up land under navigable water, thereby raising it above the water, he acquires no title to such land, and is not an adjacent owner within the statute.[2]

A riparian owner on a navigable lake may construct a pier below high-water mark if it does not obstruct navigation;[3] and under an act authorizing the proprietors of lots abutting on a river to wharf out and extend such lots, the proprietors became owners of such extensions and improvements.[4]

A city cannot by ordinance, under authority of the legislature, fix an arbitrary dock-line in a navigable river, in the bed of which the riparian owners have absolute property subject only to the public right of navigation, without notice to such owners. A dock-line cannot be fixed at a point in a navigable river occupied by rapids, and entirely unfitted for navigation proper, and where the center of the stream only is useful for floating logs. Such an act would prevent the riparian owner from building out into the intervening waters.[5]

382. What may be Done to Prevent Encroachments or to Promote Accretions.*—The right to accretion depends in no way upon the owner maintaining levees, enbankments, or other improvements.[6] The fact that accretions are due wholly or in part to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.[7]

Any reasonable means may be taken to prevent the wearing away of, and encroachment of streams upon, land. Trees may be planted, the bank may be covered with stones, a wall or embankment may be built.[8] Where an embankment is constructed for the protection of one's lands it is the duty of the owner to take care not to direct the currents so as to occasion substantial injury to his neighbor. If one has not been careful, and has not avoided such injuries as could have been reasonably anticipated by a man of ordinary prudence and intelligence, he will be liable in damages for any injuries occasioned by his act.[9] The landowner's efforts must be confined to keeping the channel in its present location, and he may not build a bulkhead and throw the current upon the opposite shore.[10] If, however, a riparian owner shall have himself erected a

[1] Dana *v.* Jackson St. Wh. Co., 31 Cal. 118 [1866].

[2] People *v.* Commissioners of Land Office (N. Y. App.), 32 N. E. Rep. 139.

[3] Mills & Allen *v.* Evans (Iowa), 69 N. W. Rep. 1043.

[4] Jacob Tome Inst. of Port Deposit *v.* Crothers, 40 Atl. Rep. 261.

[5] Grand Rapids *v.* Powers (Mich.), 50 N. W. Rep. 661.

[6] Municipality No. 2 *v.* Cotton Press, 18 La. 122.

[7] Tatum *v.* City of St. Louis (Mo. Sup.), 28 S. W. Rep. 1002.

[8] 1 Amer. & Eng. Ency. Law 139; Wetmore *v.* Atlantic White Lead Co., 37 Barb. 70.

[9] Crawford *v.* Rambo (Sup. Ct. Ohio), 22 Reptr. 529 [1886].

[10] 1 Amer. & Eng. Ency. Law 139. *See also* Diedrich *v.* R. R. Co., 42 Wis. 248.

* *See* Secs. 131-137, *supra*.

structure or placed an impediment in a stream, he cannot resist the claims of an opposite owner to accretions acquired in consequence of such structures.[1] If filling has been wrongfully added to one's bank by other parties, without his consent, as to the street opposite to proprietor's land, it will be regarded as accretion, and so much as has been added to the owner's half of the street becomes his, and his boundary-line extends to the water's edge.[2]

The fee in the streets, alleys, commons, and public grounds, lying on the lake front of Chicago, is vested in the city, together with the riparian rights appertaining thereto; and these rights were not divested by the fact that the Illinois Central Railroad occupied the lands underlying the immediate front, and filled them in for its right of way, under authority of a city ordinance; and the city still has the right to exercise such riparian rights, subject to the terms of the ordinance and to the authority of the state to prescribe the lines beyond which no structures may be extended, and also subject to such supervision and control as the United States may lawfully exercise.[3]

The reclamation by the Illinois Central Railroad Company from the waters of Lake Michigan of a tract 200 feet wide, extending along the front of the city of Chicago, and the construction of its tracks, crossings, guards, etc., and the erection of the breakwater on the east thereof, and the necessary works for the protection of the shore on the west, all as required by the ordinance under which it was permitted to enter the city, was held not to interfere with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic,—or constitute such an encroachment upon the domain of the state as to require the interposition of a court for their removal, or for any restraint in their use.[4]

The accumulation of a sand-bar in a stream is ordinarily one of those natural results which neither party has any right to interfere with by direct removal; but where its accumulation is a common injury to both parties, either would be justified in removing the sand-bar.[5]

In apportioning the lands under the waters of the Elizabeth River among riparian proprietors, no part of the port warden's line of navigation should be excluded, but the whole should be apportioned among the parties.[6]

383. Determination of Boundaries of Land Acquired by Accretion or Reliction.—When a new shore is formed on a non-navigable river by deposits and accretion and attendant erosion from the opposite side, as is usually the case, the new land on the new shore is to be divided among the owners entitled to it according to a rule of apportionment which gives to each owner a share of the new shore line in proportion to what he held in the old shore

[1] Halsey *v.* McCormick, 18 N. Y. 150. *See also* Lockwood *v.* N. Y. & N. H. R. Co., 37 Conn. 387, *and many cases innote* 4, 1 Amer. & Eng. Ency. Law 137.
[2] Steers *v.* Brooklyn, 101 N. Y. 51.
[3] Illinois Cent. R. Co. *v.* State, 13 Sup. Ct. Rep. 110.
[4] Illinois Cent. R. Co. *v.* State, 13 Sup. Ct. Rep. 110, *affirming* 33 Fed. Rep. 730.
[5] Root *v.* Johnson, 26 Vt. 64 [1853].
[6] Groner *v.* Foster (Va.), 27 S. E. Rep. 493.

line, and the division of the land is completed by running a line from the bound between the parties on the old shore to the point thus ascertained on the new.[1]

This rule has been adopted in Illinois, where land on the Mississippi River had been divided into lots extending to the river front and had become the property of several lot-owners. Accretions having formed along the river front, disputes arose as to the direction of the lines bounding said accretions: as to whether the lines ran perpendicular to the bank or perpendicular to the middle line, or by some other rule. It was decided that the lines should be run so as to give to each lot-owner the same proportion of the middle line of the river as he owned of the shore-line before the accretion was formed; that the entire river front as it was before the lots were laid out should be measured and the feet frontage of each lot noted; that measurement should be made of the middle line of so much of the river as lay opposite the shore-line so measured; and that then the middle line so measured should be divided into as many equal parts as there were lineal feet in the shore-line, giving to each proprietor as many of these parts as his property measured feet on the shore-line, and that then the division should be completed by drawing lines between the points thus established and the termini of the shore bounds. These lines were held to be the boundaries between the coterminous owners.[2]

The Wisconsin courts have adopted a similar rule to determine the division-line between adjoining holdings, in the shallow waters of a navigable bay, of owners of land bordering thereon, and located on a cove. The rule is (1) to measure the whole extent of the shore line, and compute how many rods, yards, or feet each riparian proprietor owns thereon; (2) to divide the navigable-water line into as many equal parts as such shore-line contains rods, yards, or feet, and then appropriate to each proprietor as many of such parts of such navigable-water line as he owns rods, yards, or feet of the shore-line; and (3) to draw a line from the point of division on the shore line to the point thus determined as the point of division on the navigable-water line.[3]

The courts of Virginia adopted a like rule in a case where the line of navigability formed two sides of a right-angled triangle, of which the shore-line was the hypotenuse (Fig. *d*), the line of navigability was subdivided and apportioned in the same proportions that the portions of the shore-line owned by each bore to the whole shore-line, and each owner was held entitled to

[1] 1 Amer. & Eng. Ency. Law 138, *and cases cited;* Groner *v.* Foster (Va.), 27 S. E. Rep. 493; Watson *v.* Horoe (N. H.), 13 Atl. Rep. 789 [1888]; Johnson *v.* Jones, 66 U. S. 1; Black, 222; O'Donnell *v.* Kelsey, 10 N. Y. 412; Batchelder *v.* Keniston, 51 N. H. 496; Delaware, L. & W. R. Co. *v.* Hannon, 37 N. J. Law 276; Blodgett & D. Lumber Co. *v.* Peters, 87 Mich. 498; Northern Pine-land Co. *v.* Bigelow, 84 Wis. 157. *But see* Smith *v.* Johnson (C. C.), 71 Fed. Rep. 647.

[2] Kehy *v.* Snyder, 114 Ill. 315. *See* Classes *v.* Chesapeake G. Co. (Md.), 31 Atl. Rep. 808, *and* Mulry *v.* Norton, 100 N. Y. 424.

[3] Northern Pine-land Co. *v.* Bigelow (Wis.), 54 N. W. Rep. 496.

such portion of the flats as would be bounded by lines drawn from the termini of his portion of the line of navigability to the termini of his portion of the shore-line, and that the entire line of navigability, and not merely one side of the triangle, must be so apportioned, irrespective of the fact that one part was less valuable than another.[1] The apportionment is not the partition of a subject held in common, but of a subject in which the interest of each owner is separate and needs only to be determined to prevent encroachment upon the rights of one another.[1] The shore-line in this case was the low-water mark, as the rights and privileges of the owners extended to low-water mark.

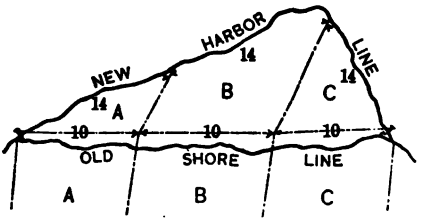


FIG. *d*.

In New Hampshire, where one of two adjoining owners whose lands are bounded on a cove fills in and makes new land extending into the cove opposite the premises of the other owner, the new land made will be divided between the two owners as if it were natural alluvion, as follows: by ascertaining the length of shore-line each owned formerly, and dividing the new shore-line in the same proportion that each one's part bore to the whole and drawing straight lines from the former to the latter boundaries.[2]

The rule is probably the most satisfactory of any yet adopted by the courts, but it gives some interesting results when applied at different periods of time or in different ways. Any rule is a poor rule which defines property rights that are distinctly at variance, depending upon the time they are determined or upon the method of applying the rule.

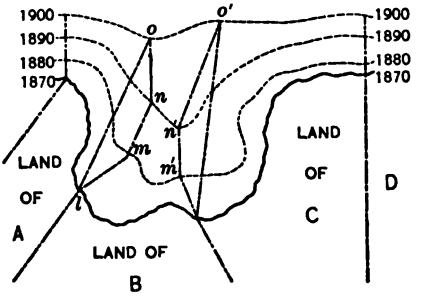


FIG. *e*.

What is meant is best shown by illustration. Suppose that A, B, and C own adjoining estates located as shown in the diagram (Fig. *e*). Suppose that A and C in 1870, '80, '90, and 1900 have their land surveyed, and by the rule of apportionment their bounds are located successively at *m*, *n*, and *o*, which makes their boundary the broken lines *lmno* and *l'm'n'o'*; and suppose that B makes his survey in 1900 for the first time since 1870; then by the rule his boundary-lines would be *lo* and *l'o'*, which inclose the parcel *lmnol* and over which controversies are certain to arise, and, as the diagram shows,

[1] Groner *v.* Foster (Va.), 27 S. E. Rep. 493.

[2] Watson *v.* Horoe (N. H.), 13 Atl. Rep. 789 [1888].

it might make considerable difference to B. Whether the dividing line should be straight, broken, or curved is the question.

Another feature of the rule that may lead to mischief is its application by the surveyor, as the result will often depend upon the extent or length of shore-line that is taken when the shore-line is very irregular. This also may be shown best by diagram (Fig. *f*). It is apparent that if, in subdividing the land to be reclaimed between the old and new shore, only A and B are considered, the division would be different from what it would be if the division were between A, B, C, D, E, and F. The question is, between what points shall the surveyor measure either the old shore or the new shore? Shall he measure from *a* to *b*, or from *a* to *c*, or from *a* to some other point, *z*? First, suppose he measures from *a* to *b* and the shore-lines measure, old 15 chains, new 10 chains; and suppose A's old shore-line is 9, and B's 6; then A gets 6 and B gets 4 chains of new shore. Secondly, suppose the surveyor measures from *a* to *c* and the shore-lines measure, old 45 chains, new 20 chains, and that the respective owners' old shore-lines measure, A's 9, B's 6 + 4, C's 6, D's 3, E's 8, F's 9; then the respective shares of each in the new shore-line, by the rule, would be: A 4; B $2\frac{2}{3} + 1\frac{1}{3}$; C $2\frac{2}{3}$; D $1\frac{1}{3}$; E $3\frac{2}{3}$; F 4 chains. While A and B received 10 chains of new shore in the first instance, for the same shore-line in the second instance they received only $6\frac{2}{3}$ chains. The case in the diagram would be an interesting one to which to apply the rule. The lines indicated are drawn according to the rule and the statement of facts in the second case. It is apparent that such a rule is not applicable in all cases.

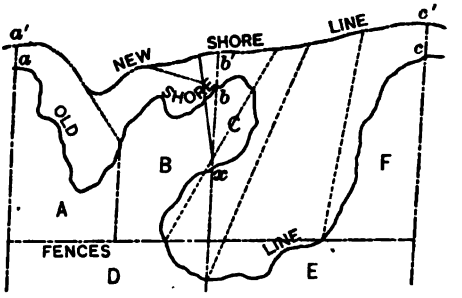


FIG. *f*.

Had the court instructed what point was to be selected in the shore-line, and between what points to measure, the rule then would be applicable to most cases. It is submitted that the rule is an especially good one for the equitable adjustment of boundary-lines. It may be applied generally to streams that are crooked and irregular, if the sections taken extend from points where the opposite banks of the stream are parallel for some distance, and where perpendiculars can be drawn to both banks and at the same time be perpendicular to the medium line, and to most cases in bays and harbors. There should be no difficulty in ascertaining what part of one line is opposite to another line, if they are parallel lines; but even then the length of shore or coast considered will change the result. Many amusing and interesting problems come up, and one may find considerable entertainment trying to adjust the rule to extraordi-

nary cases. In a recent case the Supreme Court of the state of New York held that the land under the waters of a navigable river should be apportioned between adjacent owners in proportion to their frontage upon the main channel of the river in a practically straight line, and as such line would be extended by following the line of indentations considered as a part of the river.[1]

Other rules have been adopted by courts which are even more amusing to read about, but which if undertaken in the field as a surveying operation would cause the average engineer or surveyor to sacrifice his natural respect for the courts that made them, and might also endanger his piety.

In Massachusetts the courts have held that "Flats situated in a tidal river, at a point in its course above the line of low tide, should be divided among the adjoining properties by drawing lines from the termini of the latter on the banks at the ordinary stage of water to and at right angles with the center line of the river.[2] A Louisiana court held that, where alluvion is formed, each proprietor of original tracts fronting on the river took between the lines of his old frontage on the watercourse, measured directly forward towards the new frontage.[3] In Connecticut the division of a strip of seashore has been made by running a line from the point of intersection between the division-line of the upland and the high-water mark perpendicular to the low-water mark.[4] Whether the line shall be run perpendicular to the new bank when the case is decided, or perpendicular to successive newly formed shore-lines that have existed for decades of years previous, is not explained. If the terminal bound be at a corner or projecting promontory and land has been accreted, would the rule apply or hold? (See Figs. *d*, *e*, and *f*.)

The trouble is that judges upon the bench do not consider the difficulties attending field operations. To direct that a thing be done is quite different from instructing how it may be or shall be done. It is an easy matter for a judge to sit upon the bench and direct how a boundary-line shall be located in the field by drawing in his imagination a line at right angles from bank to bank; but if his Honor were required to take a transit, placing it upon one bank and selecting some point upon the same bank for an alignment, to deflect a right angle, he would probably find that the line thus given was not perpendicular to the other bank; he would find, in short, that in order to draw a line perpendicular to two lines in the same plane they must be parallel. The operation of locating a line at right angles to an imaginary line in the middle of a sinuous stream might tax even a judge's ingenuity.

These operations might be a comparatively easy matter after the stream was carefully surveyed and plotted, but the parties frequently do not wish to go

[1] People *v.* Woodruff, 51 N. Y. Supp. 515.

[2] Tappan *v.* Boston Water-power Co. (Mass.), 31 N. E. Rep.

[3] Newell *v.* Leathers (La.), 23 So. Rep. 243 [1897].

[4] Morris *v.* Beardsley (Conn.), 8 Atl. Rep. 139 [1887].

to the expense of a careful survey and the making of a map. In such cases the surveyor is left to locate the dividing line as best his skill and patience will permit.

It has therefore been held that the rule that accretions can be divided by extending the lines of riparian owners at right angles with the middle thread of so much of the river as lies opposite the shore-line is subject to modification by special circumstances, and an instruction which fails to adapt the rule to the conditions of the case at bar is erroneous.[1]

Fortunately in most cases the property in the bed of a stream or in reclaimed land is of little value or importance, and an accurate survey is not required. Occasionally a case comes up where wharves, quays, docks, or piers are to be built, or where oyster-beds or other shell-fish interests are to be determined, or where mining is conducted, or where popular summer resorts make shore or coast privileges valuable and expensive litigation results.

387. Connection of Monuments with Inaccessible and Imaginary Bounds. —If a boundary on land end at a stream, or a stake or post or tree on the bank of a stream, a question arises as to how the thread of the stream, or, the low-water mark of a pond or body of water, shall be connected with those monuments: whether the boundary-line on land shall be produced until it meets the center of a stream, or water's edge of a body of water, or whether it shall be run in the most direct line, or whether it shall be made perpendicular to the new shore-line or to the line of the old bank; and whether the line shall be made a straight line, a broken line, or a curved line.

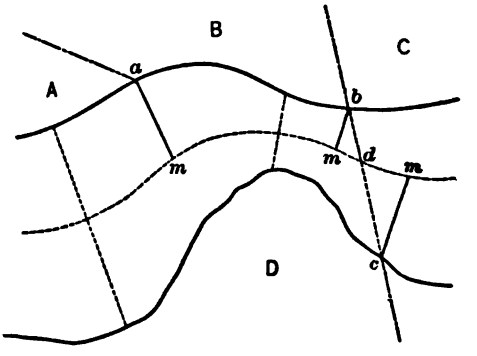


FIG. *g*.

Courts often declare that the land under water of a river or stream is measured by lines at right angles to the bank from the termini, without regard to the course or direction of the line bounding the remainder of the tract, and without regard to the depth of the water. The middle of such lines drawn from bank to bank will be the *filum aquæ*, or the middle line of the stream.[2] It does not matter how recently the bank may have been formed.[3] In the application of this rule the surveyor must not interpret it technically. When the courts say

[1] Elgin *v.* Beckwith (Ill.), 10 N. E. Rep. 558 [1887].

[2] Hopkins Acad. *v.* Dickinson, 9 Cush. 544. *See* 75 Ind. 41.

[3] Miller *v.* Hepburn, 8 Bush (Ky.) 326; Clark *v.* Campau, 19 Mich. 329; Knight *v.* Wilder, 2 Cush. 202; Bay City G. Lt. Co. *v.* Industrial Works, 28 Mich. 182; Stolp *v.* Hoyt, 44 Ill. 220; Deerfield *v.* Arms, 17 Pick. 41; Bonewitz *v.* Wygant, 75 Ind. 41.

"perpendicular to the bank" it is submitted that they have in mind a stream whose banks are parallel, and if they are not parallel, then the lines must be drawn perpendicular to the general trend of the stream.[1] (See Fig. *g*.)

Where land has been surveyed by the United States Government, and has been laid out into squares called sections, and described by section or quarter-section lines which run due north and south or east and west, it is usually held to go to the original boundary-lines. Therefore, in a case where two irregular pieces of land were separated by a quarter-section line running north and south, and were bounded southerly by a river running southeast, it was held that the accretions formed by the recession of the river to the south applied to the respective tracts lying due north thereof, but that the division-line between the two tracts east and west continued to be the quarter-section line extended.[2]

The judicial settlement of the divisional line between adjoining riparian proprietors, so far as the line runs from high- to low-water mark, is at least a *prima facie* settlement of the relative rights of the parties beyond low-water mark.[3]

388. Subdivision of Lowlands Reclaimed.—The same rules are applied to the apportionment of low and submerged lands as are applied to accretions. The rules are not universal. They vary in different states, and are sometimes varied to meet particular cases to do justice to all parties.[4] The law undertakes to apportion the newly acquired land in proportion to the land which the parties hold as riparian owners, and by virtue of which the law attributes to them the ownership of the acquisition.

Two things are to be kept in view in making such an equitable distribution: one is that each owner shall have a share in the newly formed land in proportion to the acreage of their several estates; the other is to secure to each an access to the water and a share in the river-line in proportion to his share on the original line of the water. Whether the division should be in proportion to the area, or the length of the water-line, of the owner's possessions seems to depend upon whether the newly formed land is more valuable for farming and cultivation or whether its value is chiefly due to its being bounded by a stream, and useful for landing-places, docks, quays, and other accommodations. The rule which shall most nearly, in general, accomplish these two conditions will come nearest to doing justice.

The real value of such accretion and additions is due to their proximity to the stream and not to their usefulness for farming purposes. The author has yet to find any case in which accretion to a shore or bank has been distributed in proportion to the areas of the adjoining tracts. If a man owned a narrow strip lying upon the bank of a stream, and another man a long narrow strip perpendicular to the stream whose shore-line was but a fractional

[1] 1 Amer. & Eng. Ency. Law 189.

[2] McCaman *v.* Stagg (Kan. App.), 43 Pac. Rep. 86; Stark *v.* Miller (Mich.), 71 N. W. Rep. 876.

[3] Proprietors of Maine Wharf *v.* Proprietors of Custom-house Wharf, 27 Atl. Rep. 93, 85 Me. 175.

[4] Elgin *v.* Beckwith (Ill.), 10 N. E. Rep. 558 [1887].

part of that of the first riparian owner, but whose area was double, a subdivision which gave the second owner double the length of the new shore that was given to the first would hardly be characterized as just; and it is believed that such a principle has never been applied in subdividing or apportioning lands formed upon waters.

This injustice is avoided by dividing the new shore-line in the same proportion that the length of each owner's original line on the shore or water mark bears to the total length of the old shore-line.[1] This rule may require modifications perhaps in particular circumstances. For instance, in applying the rule to the ancient margin of a river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such a case it should be reduced, by an equitable and judicious estimate, to the general available line of the land upon the river.[1]

389. Submerged Lands the Subject of Sale, Patent, and Lease.—An owner of lands underlying a non-navigable inland lake, with an inlet and outlet stream, may lease his interest in such lake for a term of years, reserving to himself the right of fishing therein during such term.[2]

The right of the riparian proprietor on navigable waters to reclaim and occupy the submerged lands out to the point of navigability may be separated from the shore-land, and transferred to one having no interest in the parent riparian estate.[3]

The title to tide-lands in the territories is in the United States, and they may make grants thereof.[4]

A patent for public lands reciting a purchase of all the unsurveyed sea-marsh in a certain township, containing a certain number of acres and extending back to a certain bay according to the official plat of the survey of said lands in the state land office, does not show a sale *per aversionem*.[5]

In the state of Washington a conveyance of the upland passes littoral rights to the abutting tide- or shore-lands patented to grantor by the United States, and in connection with the possession of the same, from the time it was deeded to them.[6]

390. Effect of Sudden Changes on Boundaries.—In cases of changes by accretions to the shore or bank, especial notice is directed to the words "*slow, gradual, and by imperceptible degrees*"; for the rule is changed if these additions and changes are sudden, perceptible, or the result of one act of nature, as a flood, a storm, a landslide, an earthquake, or upheaval. In such

[1] Chief Justice Shaw in Deefield *v.* Arms, 17 Pick. 41.

[2] Bass Lake Co. *v.* Hollenbeck, 11 Ohio Cir. Ct. Rep. 508. *See* Jacob Tome Inst. *v.* Crothers (Md.), 40 Atl. Rep. 261 [1898].

[3] Bradshaw *v.* Duluth Imperial Mill Co. (Minn.), 53 N. W. Rep. 1066.

[4] Carroll *v.* Price (D. C.), 81 Fed. Rep. 137.

[5] State *v.* Buck (La.), 15 So. Rep. 531.

[6] *In re* Seattle Tide Lands, 53 Pac. Rep. 341.

cases the land will belong to the original owner whether it be an individual proprietor or the state.[1]

If the change be sudden, leaving large tracts of submerged lands uncovered, dry, and fit for the ordinary purposes for which land is used, it then belongs to the state, unless it has been previously owned by an individual and he can still make out where and what his land was. The original boundaries that existed before the flood or upheaval will remain the true boundary.

To hold that a change by artificial means would extend the boundaries of a lot would be as unreasonable as to decide that the removal of landmarks by which the boundaries of a farm are defined would extend or contract its area.[2]

Land detached from one side of a river by a sudden change in the channel, and left connected with the land on the other side, in such manner as to be capable of identification, is not an accretion.[3] Where a creek in time of freshet, breaks through a narrow neck of land, and afterwards continues to flow through the new channel, separating the neck from the tract to which it originally belonged, such separation is not caused by the "wear of the creek," within the meaning of a deed which conveyed to plaintiff the tract of which such neck was a part, "less the wear of the creek."[4] The middle of the old channel of the stream still constitutes the boundary of the tract, though there may be no water flowing therein.[5]

A diversion of a non-navigable fresh-water stream by artificial means by a mill-owner does not change a town boundary consisting of the center of the stream before the diversion occurred.[6]

When a lake five miles long and one hundred rods wide was drained in one year by an artificial ditch and by the cutting into it of a river, a riparian owner did not not acquire title to the bed of the lake under the law of accretions.[7]

When a sudden action of water takes a considerable quantity of soil from the land of one proprietor and deposits it upon the land of another, the title to such soil remains in the original owner if he claims it before it is united with the soil of the other owner.[8] The importance of such changes will be better appreciated when we read in the daily papers of floating islands, of between one and two acres in extent and from four to five feet thick, coming

[1] 1 Amer. & Eng. Ency. Law 137; Tyler on Boundries 81–94; Bouvier *v.* Stricklett (Neb.), 59 N. W. Rep. 550; Hahn *v.* Dawson (Mo.), 36 S. W. Rep. 233; Wallace *v.* Driver (Ark.), 33 S. W. Rep. 641.

[2] Judge Denio in Halsey *v.* McCormick, 13 N. Y. 296.

[3] Coulthard *v.* Davis (Iowa), 70 N. W. Rep. 716.

[4] Henning *v.* Bennett (Sup.), 18 N. Y. Supp. 645; Sweatman *v.* Holbrook (Ky.), 38 S. W. Rep. 691; McKay *v.* Huggan, 24 Nova Scotia 514.

[5] Bouvier *v.* Stricklett (Neb.), 59 N. W. Rep. 550 [1894]; State of Neb. *v.* State of Iowa, 12 Sup. Ct. Rep. 396.

[6] *In re* Town Boundaries (R. I.), 42 Atl. Rep. 870 [1899].

[7] Noyes *v.* Collins (Iowa), 61 N. W. Rep. 250.

[8] 1 Amer. & Eng. Ency. Law 137.

down rivers, colliding with boats, piers, and bridges, and finally stranding upon submerged flatlands.[1]

It is submitted that the same rule would be followed in case of landslides or earthquakes. The party would doubtless be required to remove his land in a reasonable time or forfeit his ownership. Would he be liable for the damages to his neighbor? A curious question of duties and boundaries must be presented in such a case where the landslide is of great extent; the determination of which is, it is believed, yet to be decided: whether the proprietor of the upper or the owner of the lower stratum would enjoy the benefits of the surface soil. If the submerged tract was open to mining, no doubt the proprietor would be permitted to continue mining operations. If the proprietor of the part that has descended were a farmer, and his house, buildings, and fields had been transported to realms below, would he be allowed to continue to sow his fields and reap his crops?

When a tornado passed over a city, in which business buildings were situated, sweeping away hundreds of large houses, and killing and bankrupting many persons; and a large five-story brick building was blown down, and fell on the adjoining lot and house, causing great damage to the house and goods by reason of the fact that the *débris* of said brick building remained on said house and goods, and it was alleged that the owner of the building willfully, wrongfully, carelessly, and without right refused and neglected to remove it for four days after notice to do so, it was held that there was no cause of action, since it did not appear that defendant owner was able to remove the *débris* sooner by the use of reasonable diligence after receiving the notice.[2]

[1] Reported from Havana, Ill., March 17, 1896.

[2] Ingalls *v.* Hart Hardware Co. (Ky.), 20 S. W. Rep. 387.

CHAPTER XXII.

BOUNDARIES ON WATERS. LAND BOUNDED BY, ALONG, UPON, OR ON A STREAM OR THE BED, BANK, BEACH, OR SHORE.

401. Monuments Described as on the Bank or Shore—Intention Expressed.—Natural monuments, such as trees, rocks, etc., mentioned in a deed as occupying the bank of a stream are not presumed to be the real boundary corners, or to stand on the precise water-line, at its high- or low-water mark. They are used rather to fix the termini of the line described as following the sinuosities of the stream, and to give the direction of lines running to the stream. The law must determine whether the boundary-line shall be above or below tide-water, and whether the one-half of the river with its islands shall be included. At common law, if the stream at the place in question is not subject to the ebb and flow of tides, and the grant is so framed as to touch the water of the stream, and the parties do not expressly except the stream, one-half of the bed of the stream is included by construction of the law.[1]

Some states make a distinction in the construction of the law for grants on non-navigable streams from those on navigable non-tidal streams. The states of Alabama, Arkansas, California, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, Oregon, Pennsylvania, Tennessee, Virginia, and in a few instances Kentucky, Michigan, New York, and North Carolina have held navigable streams and their beds to be public property, and that therefore descriptions touching the water did not by implication convey to the center of such bodies of water (streams). On the other hand, Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Vermont, Wisconsin, England, and Ireland give title to the beds of navigable non-tidal streams as well as of non-navi-

[1] Luce *v.* Carley, 24 Wend. 451 [1840]; Rice *v.* Munroe, 36 Me. 309; Cold Sp. I. W. *v.* Tolland. 4 Cush. 492; Warren *v.* Thomaston, 75 Me. 329 [1883]; Day *v.* Pittsburg, Y. & C. R. Co., 22 Reptr. 533 [1886]; Gas-lt. Co. *v.* Indus. Works, 28 Mich. 181; Morris *v.* Hill, 1 Mich. 202; Gavit *v.* Chambers, 3 Ohio 496; Benner's Lessee *v.* Platter, 6 Ohio 505; Walkerer *v.* Bd. P. W., 16 Ohio 540; Kaukauna W.-p. Co. *v.* Green Bay Co., 12 Sup. Ct. Rep. 173.

gable streams to private persons who are riparian owners.[1] There are some exceptions, as the Mohawk and Hudson rivers in New York, which are affected by the doctrine of the civil law which prevailed in the Netherlands, from which government they were derived.[2] The rule does not maintain generally in grants upon large lakes and ponds; on the contrary, the boundary-line is generally the low-water mark.[3]

What follows may therefore be taken as generally true of streams that are not navigable, and are not tidal streams, and it may be true for navigable streams in the list of states given and which recognize private property in the bed of streams that are *in fact* navigable.

402. Practical, Common-sense Rule Applied.—The law as stated is believed to be the correct rule of construction either from the standpoint of common sense or from the practice and customs of surveyors. Much can be said in favor of this rule, and little against it, except the prestige established by earlier decisions, and the matter of opinion in each case as to what the grantor's real intentions were.

To begin with, "a line run to the stream" does not restrict the grant to the *bank* or *shore* of the stream. The stream is the monument, and, like a tree, a stake, a stone, or any other monument, controls the distance, and is to be considered as located equally on the land granted and the land of the adjoining owner. The center of the monument should be the boundary, and the grant should extend to that point.[4]

This is believed to be in sympathy with the feelings and practices of surveyors generally. Without adhering to such a construction water-gores would be multiplied by thousands along our inland streams small and great, the intention of parties would be continually violated, and litigation become interminable.[5]

403. Water Regarded as an Element and a Natural Appurtenant to Land.—*Prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream. The bank is the principal object, and when the law once fixes the proprietorship of that, the soil of the river should follow as an incident, or rather as a part of the subject-matter, to the middle of the stream. The law does not stop to criticise the precise words by which a man is made owner. Is he the shore-owner? If that be so, he touches the water, and the construction of the law does not require express words for the grant of every part of one's estate. Houses, fences, mines, the elements of light, air, and water, all pass by the word *land*, "*usque ad cœlum, et ad infernos.*" By the same principle it passes the adjoining fresh-water stream to the median line of its margins. The passing of one element may just as well be questioned as another not only in the eye of the law, but in

[1] 16 Amer. & Eng. Ency. Law 253–256.
[2] Smith *v.* Rochester, 92 N. Y. 463.
[3] 16 Amer. & Eng. Ency. Law 250–256.
[4] Justice Stanley in Sleeper *v.* Laconia, 60 N. H. 201.
[5] Cowen, J., in Luce *v.* Carley, 24 Wend. 451. *And see* Gray's Real Property Cases 325.

common sense and reason. What would be more absurd for the law than to give a man the shore or side of a fresh-water river, and yet, by saving the bed to a grantor, make the grantee of the bank a trespasser every time he should slake his thirst or wash his hands in the stream? If all the beds of our rivers are treated as being in the grantor, and it is conceded that he may have the right to reserve gores and parts of streams, innumerable pieces will be left, which may have as many owners, or be without any owner. Their practical value would be little or nothing, and access would be difficult without trespassing upon riparian owners' lands and provoking endless litigation. A door would be open to incalculable mischief. Intruders would fall into endless broils among themselves and involve the adjacent owners in controversies. Stones, soil, gravel, and water-rights would be subjects for individual scramble, necessarily leading to violence and outrage.

The law that a grant bounded by a stream goes to its middle line has long been understood. When the grant extends to the shore, but excepts so important a part as the stream, the description should state the exception in terms.[1] Otherwise the allowance of such an exception would operate as a fraud gross in its character and dangerous to a very large portion of a community. Anxiety to connect water with the main premises runs through the whole history of law. If it cannot give the land under the water as parcel of the grant, it will save the water as an appurtenance. If a man owns land on both sides of a stream, and also owns the bed of the stream, he may dispose of any part and of so much of it as he pleases. That is a right incident to property. But if he wishes to retain the exclusive property of the stream in himself, the law requires him to make it so plain as to afford no reasonable doubt of his intention.

404. Effect of Field Operations on Descriptions of Boundaries.—In surveying it is impracticable to determine or meander the center-line of a stream. Field operations are confined to the bank or shore, and it is the universal practice of surveyors to describe property by the lines run. Courts do not always consider these things in interpreting grants and conveyances, but have attributed the conception and exception of the description to the grantor. It may be that this is necessary on principle in law; but to ascertain the intention of a grantor, it is proper for a court to put itself in the grantor's position and to consider every circumstance surrounding the parties at the time of the conveyance. If then it be the common custom to incorporate the surveyor's notes and description in the grant, it should be no injustice to consider the practice of surveyors in making his survey, and his description made therefrom in interpreting a deed of conveyance.

Few surveyors have been informed of the rules of law with regard to boundaries. Their knowledge has been confined to the mathematical and field operations of surveying, and their duties have been to interpret descrip-

[1] People *v.* Bd. of Supervisors, 125 Ill.9 [1888].

tions prepared by some older and perhaps less-informed surveyor, or to simply run out lines indicated by the grantor, who was equally ignorant of the laws of boundaries. If a surveyor be directed to survey a farm bounded by a river, he will ordinarily include in that survey the surface land only, and his survey will end at the edge of the stream. To do otherwise would incur considerable expense, time, and discomfort. What then would be more natural than for a surveyor chaining or running along a bank or on the shore than to describe the land surveyed by words and phrases that aptly describe the operations he performed? This, it is submitted, is an almost universal practice.

405. Construction of Deed is Largely a Question of Intention.—The boundaries of land upon waters are often modified or even changed from what they would be according to law by the expressed intention of the grantor. To determine this intention certain words have acquired definite meanings, and will generally be interpreted in the light of those meanings. Other circumstances may surround the case, other parts of the description may show a different intention, but in the absence of such modifications in the description, or of conflicting testimony,* or conditions that are repugnant to such a conclusion, it is pretty certain that a like interpretation will be given to the same words by other courts.

406. Land Bounded At, On, Along, By, or With a Stream or Body of Water.—In the absence of an expressed reservation limiting a riparian owner to the margin of the stream, he usually owns to the center of the stream.[1] If the calls in the conveyance are for corners *on* the bank of a stream and there is an intermediate line extending from one such corner to the other, the stream is the boundary of all riparian rights.[2] If a tract of land be bounded by a stream and its meanders and the lines be described as going to a stake on the bank, yet the owner of the tract follows the stream and is entitled to any accretions to its banks.[3]

A conveyance of platted lots which are situated *upon the bank* of a navigable stream, no part of the bed of the stream being platted, includes all the riparian rights of the grantor in front of said lots to the center of the stream, although such stream is not mentioned in the conveyance. To exclude such rights they should be reserved or excepted in the deed.[4]

Where the government grants lands *on the banks* of a fresh-water stream, without reservation, in states where the common law prevails, all unsurveyed

[1] Ingraham *v.* Wilkinson (Mass.), 4 Pick. 268; Bardwell *v.* Ames (Mass.), 22 Pick. 333; Pratt *v.* Lamson (Mass.), 2 Allen 284; Illinois, etc., Canal *v.* Harris, 11 Ill. 554; Rockwell *v.* Baldwin, 53 Ill. 19; Houck *v.* Yates, 82 Ill. 179; Luce *v.* Carley, 24 Wend. (N. Y.) 451 [1840].

[2] Whitehurst *v.* McDonald, 52 Fed. Rep. 633.

[3] Denny *v.* Cotton (Tex.), 22 S. W. Rep. 122.

[4] Head *v.* Chesbrough (Com. Pl.), 4 Ohio N. P. 73.

* *See* Secs. 611–640, *infra*.

lands between the middle line of the stream and the bank pass by the grant, and the riparian owner cannot be divested by a subsequent survey and grant of the islands.[1]

Calls for two corners, one at high-water mark *on the bank* of a stream and the other *at the stream*, were held to make the stream the boundary-line when no contrary intention was shown.[2]

A deed describing the land conveyed as beginning *at the sea*, on A's line, thence south on the said A's line to the highway, thence west on the highway ten rods to the stake, thence north *to the shore*, parallel with said A's line, thence east to the first bounds mentioned, and no intention was expressed to retain the adjoining shore as distinct from the upland, was held to convey the flats, or shore, with the upland.[3]

A boundary running to a monument standing on the bank, and from thence running *by the river* or *along the river*, will not restrict the grant to the bank of the stream, for the monuments in such cases are only referred to as giving the directions of the lines *to the river*, and not for the purpose of restricting the boundary on the river. A deed describing the lines as *to a tree on the bank* of a river, thence *up said river*, locates the line at the thread of the stream, and that location is not changed by other words in the same description giving the length of lines and quantity of land conveyed.[4] A survey running *to a point on a river* and thence *down said river*, and bounding thereon to another point, includes a sand-bar on the same side of the river, between the two points.[5]

A description extending the boundary-line of land from a given point, by certain courses and distances, *to the mouth* of a certain creek, and *thence ascending said creek* by certain courses and distances, was held to make the thread of the creek the boundary-line, regardless of the last-named courses and distances, even though the creek was a tidal stream, the grantor having the title to its bed.[6]

A conveyance of lands on a navigable stream by boundary-line coincident with the line of navigation conveys the grantor's title to the central thread of the stream.[7]

A grant of land in New York described by reference to a monument standing *on the bank* of the river, and by a course given as running from it down the river as it winds and turns to another monument, conveys to the middle of

[1] Grand Rapids & I. R. Co. *v.* Butler, 15 Sup. Ct. Rep. 991; Fuller *v.* Shedd (Ill.), 4 N. E. Rep. 286. *But see* Steinbuchel *v.* Lane (Kans.), 51 Pac. Rep. 886 [1898].

[2] Whitehurst *v.* McDonald (C. C. A.), 52 Fed. Rep. 633, *and cases cited.*

[3] Snow *v.* Mt. Desert I. R. E. Co., 84 Me. 14.

[4] Kent *v.* Taylor (N. H.), 13 Atl. Rep. 419 [1888]; Runion *v.* Alley (Ky.), 39 S. W. Rep. 849; People *v.* Bd. Supervisors, 125 Ill. 9 [1888].

[5] Asher Lumber Co. *v.* Lunsford (Ky.), 30 S. W. Rep. 968.

[6] Freeman *v.* Bellegarde (Cal.), 41 Pac. Rep. 289; Hanlon *v.* Hobson (Col.), 51 Pac. Rep. 433 [1897].

[7] Lake Shore & M. S. R. Co. *v.* Platt (Ohio Sup.), 41 N. E. Rep. 243. *But see* City of Oakland *v.* Oakland Co., 50 Pac. Rep. 277.

the stream unless the river be expressly excluded from the grant by the terms of the deed. If the description carries the grant to the water of the stream, and the stream is not expressly excepted, one-half of the bed of the stream will be included by construction of the law.[1]

So a grant extends to the center of the river by the description: "That fraction lying *on the south side* of the A. River, and on each side of . . . S. Avenue, and extending from the avenue to the river, east and west."[2]

An instruction which treats as a non-navigable river a boundary indicated in a survey as "the bed of a dry creek" is not materially defective.[3] The same rule in regard to boundaries on streams applies to both natural and artificial streams.[4]

In New York state riparian owners of lands, adjoining fresh-water navigable streams and small lakes within the state where the tide does not ebb and flow, own the stream except that the public has an easement in such waters and for the purpose of travel the same as on a public highway. This easement, as it pertains to the sovereignty of the state, cannot be alienated, and it gives to the state the right to use, regulate, and control the waters for the purpose of navigation. It does not give to the state any right to convert the waters or to authorize their conversion to any other use than those for which the easement was created, viz., for the purposes of navigation.[5]

A creek is a monument which may be referred to as a boundary without vitiating the description for uncertainty. After such a description the addition of a more particular description by giving the courses and distances of the boundary-lines will not be regarded as a reformation of the deed, and evidence of extrinsic facts will be admitted to explain the defective description.[6]

407. To the Bank or Shore, thence up the Stream.—When land is bounded upon a stream and the line is described as running *to a creek and up the same to a certain point*, or *up the same*, or *up the creek with its meanders*, it implies that the line is to follow the creek according to its windings and turnings. If, however, the language of the description be, beginning *on the bank* of the creek, thence *up the creek* with its meanders, it is held that the *margin* of the creek is the boundary, and not the middle of the stream.[7]

In several states, if the land is bounded *by the bank* of the river, or is described by a line, as running *along the bank* of the river, or *along the margin* of the river, it does not convey to the middle of the stream.[8] If the word

[1] Luce *v.* Carley, 24 Wend. 451 [1840].
[2] Hanlon *v.* Hobson (Col.), 51 Pac. Rep. 433, 42 Law Rep. Ann. 502 [1897].
[3] Barnhart *v.* Ehrhart (Oreg.), 54 Pac. Rep. 195 [1898].
[4] Agawam Canal Co. *v.* Edwards, 36 Conn. 476.
[5] Smith *v.* Rochester, 92 N. Y. 463 [1883].
[6] Travellers' Ins. Co. *v.* Yount, 98 Ind. 454 [1884].
[7] Starr *v.* Child, 20 Wend. 149; Stone *v.* Augusta, 46 Me. 127 [1858]. *But see* Buck *v.* Squires, 22 Vt. 484, *and* Sleeper *v.* Laconia, 60 N. H. 201.
[8] People *v.* Bd. of Supervisors, 125 Ill. 9 [1888].

shore is employed instead of *bank*, it would be the same (N. Y. rule), and convey to the water's edge at low-water mark.[1] A grant *to the seashore, thence by the seashore*, does not carry title beyond high-water mark.[2] A line running *to the bank* of a creek or stream will give title to the low-water mark of the stream at the time, and also to any accretions made to the stream.[3]

A deed conveying land bordering on a stream, and defining its boundaries as commencing *at the intersection* of a certain ditch *with the shore-line* and extending by courses and distances named to the *shore of the same stream*, thence *along said shore* as it winds and turns, to the commencement, made the *shore-line* the boundary, and did not convey the land lying between the low-water mark and the thread of the stream.[4]

A description which read, "commencing at a stake and stones *on the west bank* of a river," and after running the other sides of the field by certain courses and distances to another stake and stones on the same bank, continued "thence *upon the bank* at high-water mark to place of beginning," was held to define the boundary and not to include flats between high- and low-water marks.[5] Land "bounded *on the south* by C-lake, and meandering *along the water's edge* eastward to a stake *at* the lake's low-water mark," conveyed merely to the water's edge, and the grantee acquired no title to any of the portion covered by water.[6]

When one of the boundaries is substantially coincident with the shore of a lake at low-water mark, the intent to convey to such mark will be presumed, in the absence of language indicating a contrary intent, though the lake is not named as a boundary.[7]

A boundary extending *to* and *on the pond*, referring to a natural pond artificially raised at certain seasons of the year by a dam, was held to extend to low-water mark of the pond in its natural state; and the fact that the deeds were made during the season when the pond was temporarily raised by a dam cannot affect the extent of their operation.[8]

If there are other parts of the description that show an intention to convey more than the meaning of the words convey, such parts will hold, as when a deed described the boundary of the land conveyed as beginning *at a fixed point*, and running a certain course, a distance of "about" 865 feet, *to a point on the shore* of Long Island Sound, thence running *along the shore and sound*

[1] Starr *v.* Child, 20 Wend. 149.

[2] Brown *v.* Heard, 85 Me. 294; Litchfield *v.* Scituate, 136 Mass. 39, 48 [1883]. *See also* Provins *v.* Lovi (Okl.), 50 Pac. Rep. 81 [1891].

[3] Halsey *v.* McCormick, 13 N. Y. 296; Cruikshanks *v.* Wilmer (Ky.), 18 S. W. Rep. 1018.

[4] Freeman *v.* Bellegarde (Cal.), 41 Pac. Rep. 289; Freeman *v.* Leighton (Me.), 38 Atl. Rep. 542 [1897].

[5] Dunlap *v.* Stetson, 4 Mason 349; Carpenter *v.* Board of Commissioners (Minn.), 58 N. W. Rep. 295.

[6] Brophy *v.* Richeson (Ind. Sup.), 36 N. E. Rep. 424; Axline *v.* Shaw (Fla.), 17 So. Rep. 411.

[7] Slauson *v.* Goodrich Transp. Co. (Wis.), 69 N. W. Rep. 990.

[8] Paine *v.* Woods, 108 Mass. 160. *But see* Smith *v.* Youmans (Wis.), 70 N. W. Rep. 1115.

to a certain point, and thence, by a given course, a distance of "about" 1288 feet, to the place of beginning, containing a certain number of acres "more or less." To make the distances and acreage agree with the deed, the courses would have to be run to low-water mark and along low-water mark, and it was held that the deed conveyed the land *to* low-water mark and included the shore, notwithstanding the rule that *by the shore* as a monument means the line of high water when the boundary is the sea.[1]

Where a deed describes the land conveyed as beginning at a certain point and "running thence east, *to the top of the bank* of the Genesee River, thence southeasterly, *along the top* of the bank, to a point that a line parallel with the north line will contain ten acres, . . . containing ten acres and no more," the course "along the top of the bank" follows the meanders of the bank.[2]

In the Circuit Court of California, under a Mexican grant which described the land as bounded *by the shore of the bay*, a description by courses and distances includes the land to ordinary high-tide line, though "shore" under the Mexican law extended only to the extraordinary high-tide line, and the Mexican grant described the land as bounded *by the shore*, as words used in a common-law court decree must be given the common-law interpretation.[3] In another case it was held that the expression *to the west on the sea*, in a Mexican grant, bounds the land granted by high-water mark, and does not extend it to low-water mark;[4] it includes only the lands above high-water mark, and not the tide-lands.[5] The fact that the civil or Roman law has always been the recognized law of Mexico, and that under that law the doctrine of state ownership of the beach between high- and low-water mark does not obtain, does not make a colonization grant of upland bounded by the sea include the beach or shore.

In California the title to tide-lands between high- and low-water mark is in the state, except in cases where grants may have been made by the Mexican government, before the territory was acquired by the United States, expressly covering tide-lands; in which event the United States, under the treaty of Guadalupe Hidalgo, would be bound to protect all private rights to such lands as against the state.[6] Similarly in conveyances whose boundaries are described as running *to the shore*, and thence *by the shore*, or where land is bounded *by the bank* of a stream, it is held that the *shore* or *bank* is the boundary, and that the water is excluded.[7]

[1] Oakes *v.* De Lancey (N. Y. App.), 30 N. E. Rep. 974, *affirming* 15 N. Y. Supp. 561, *and* 24 N. Y. Supp. 539.

[2] *In re* Rochester (Sup.), 40 N. Y. Supp. 1007.

[3] Valantine *v.* Sloss (Cal.), 37 Pac. Rep. 326-329.

[4] Coburn *v.* San Mateo Co. (C. C. N. D. Cal.), 75 Fed. Rep. 520.

[5] More *v.* Massini, 37 Cal. 432; U. S. *v.* Pacheco, 2 Wall. 587.

[6] Coburn *v.* San Mateo Co. (C. C.), 75 Fed. Rep. 520.

[7] Starr *v.* Child, 20 Wend. 149, *and cases cited;* Gouveneur *v.* National Ice Co. (N. Y. App.), 31 N. E. Rep. 865; Axline *v.* Shaw (Fla.), 17 So. Rep. 411; *In re* Rochester (Sup.), 40 N. Y. Supp. 1007; People *v.* Board (Ill.), 17 N. E. Rep. 147 [1888]; Morrison *v.* First Natl. Bk. (Me.), 33 Atl. Rep. 782.

In some states it is held that the boundary-line of a non-navigable stream is the middle, whatever language is employed in the description. This seems to be the rule in Connecticut, New Hampshire, and Pennsylvania. In *New Hampshire* it was held that a description of a boundary as going *to the river*, thence northeasterly *on the river shore* to a street, passed title to the middle of the river.[1] The phraseology of the description must be clear and specific in order to reserve the property in the stream, or to limit the boundary-line to the bank or water-mark. There seems to be a decided tendency towards this rule to hold the boundary of a non-tidal stream to be the middle unless the language is so explicit as to show beyond a doubt that it was the grantor's express intention to reserve the stream from the conveyance.[2]

408. Expressions that do Not Carry Boundary to Water's Edge.—Probably not one in ten surveyors even considers or weighs the import or technical meaning of the words he employs in his notes and descriptions, and especially of such small and seemingly insignificant particles. Probably the words *up a stream* or *along a shore or bank* would convey to their minds the same meaning ordinarily as *in*, *by*, or *along a stream*, but the courts have distinguished them, and are likely to again, and it is well for engineers and surveyors to know these distinctions.

The words *running from thence up a brook* have been held not to imply necessarily *on* or *by* the brook. "*Up a brook due west* until it strikes the line of the common land" was therefore construed to mean in a direct line *due west*, and not following the course of the brook; the court adding that if the intention had been to make the brook the boundary, it would naturally have been stated that the line was run *on* or *by* the brook.[3] A call *thence north down the stream* to a known point described was held to require the line to be run straight to that point.[4]

A call "from a fixed monument on the edge of a creek *up the same* by a single course to another fixed monument on said creek" has been construed to follow a straight line from monument to monument, and not to follow the windings of the creek. A different construction might have been adopted had it been to follow "the several courses thereof" or "the general course being," or had similar language been employed.[5]

The word *meander* has been held to mean to follow a winding or flexuous course but when land was described as "beginning at a stake in the Bay of Shallows, . . . thence with the *meander* of the river, N. 60° W. 20 Chs. to Shark Point," it was held that the boundary-line was the line described.[6]

This interpretation is subject to modification, however, where the descrip-

[1] Sleeper *v.* Laconia, 60 N. H. 201.

[2] *And see* Hughes *v.* Providence R. Co., 2 R. I. 508, 512; *and* Olney *v.* Fenner, 2 R. I. 211, 214; People *v.* Bd. of Supervisors, 125 Ill. 9 [1888]; Piper *v.* Connolly, 108 Ill. 646 [1884], *and cases cited;* Sleeper *v.* Laconia, 60 N. H. 201.

[3] Bowman *v.* Farmer, 8 N. H. 402.

[4] Rains *v.* Rains (Ky.), 20 S. W. Rep. 1099.

[5] Wharton *v.* Brick (N. J.), 8 Atl. Rep. 529 [1887].

[6] Turner *v.* Parker (Ore.), 12 Pac. Rep. 495 [1887].

tion clearly indicates an intention to convey to the water-line. Thus where the moiety of a tract was described in a deed as commencing at a certain stake on the south, and running due north to the stake on the line of said tract, thence west along the said line to the corner, south to the southwest corner, thence east to the place of beginning, and it appeared that the said southwest corner was at the meander-line of the tide-water, it was held that it must be presumed that the beginning line of the boundary was upon said meander-line, and that the course from the southwest corner to that point was intended to be along such meander-line, and not on a direct line between those two points. It was held that in taking distances from one point to another on navigable water the measurement shall be its meanders, and not in a direct line.[1]

409. Middle Line of Streams the Boundary.—Streams are designated as boundaries the same as any other natural features. If a boundary be described as a stump or a row of trees, or an embankment, or a ditch, or a wall, without any words of restriction, the legal presumption is that the middle of the row of trees, embankment, or wall is intended. There is no reason in logic or practice why the same should not hold for a stream. If a stream bounds a piece of property, one cannot say generally it is the one side more than the other, and the most reasonable conclusion is that it is the middle. This is the law generally on all unnavigable streams; the boundary-line is the middle line of the stream—the *filum aquæ*, as it is called in law.

This line is independent of the varying depth of the stream. It is the middle line of the water's surface measured in a line perpendicular to the general trend or direction of the stream, the line that is half-way between the two opposite water's edges.[2] This, it is submitted, is determined independent of narrow inlets, coves, and bays that do not form a part of the stream proper. It is evident that as the stream may be deep near one bank and then shallow on the opposite side, the stage or height of the water at different seasons will materially change this middle line (see Figs. *h* and *j*). This indefiniteness of location is somewhat diminished by mak-

FIG. *h*.

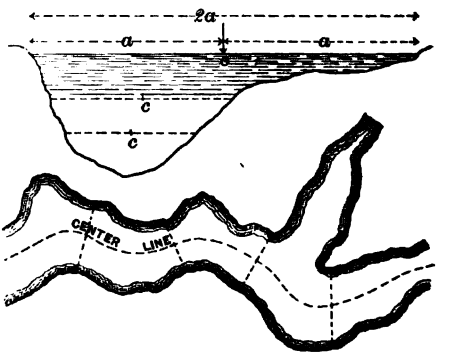


FIG. *j*.

[1] Rayburn *v.* Winant (Ore.), 18 Pac. Rep. 588 [1888]. *But see* other cases in which the boundary line between two points was presumed to be straight. Burlock *v.* Taylor, 16 Pick. 335 [1835]; Riggs *v.* Riggs, 135 Mass. 240 [1883]; Wharton *v.* Brick (N. J.), 8 Atl. Rep. 529 [1887]. *In re* cases where measurements have been made from the eaves, *see* Tyler on Boundaries 205, *bottom*; and to centre of street on boundaries, *see* Tyler on Boundaries 206.

[2] *See* Johnston *v.* Jones, 1 Black 209–222 [1861]; *and see* 23 Vt. 319.

ing it the middle of the low-water marks on both sides; but at best it must be indeterminate. It may vary from year to year by accretion and erosion, for it will always be located by taking the middle of a line drawn at right angles to its general direction from bank to bank, no matter how recently the bank may have been formed.[1] *

Where the navigable water-line and the shore-line are elongated by deep indentations and sharp projections, the meander-line, as located by the government survey, and the actual navigable water-line, should be discarded, and the general available shore-line and the general trend of the navigable water-line adopted.[2] Where ledges or spits or tongues of land project out beyond the meander-line of a bay, they are included as part of the fractions of sections shown on the government survey, and conveyed by government patent.[3]

Whether the stream is the boundary between the United States and a foreign country or between separate states or private landowners, that boundary follows any changes in the stream which are due to a gradual accretion or degradation of its banks.[4]

The expressions "middle of the Mississippi River" and "the center of the main channel of that river," as used respectively in the enabling acts under which the states of Illinois and Wisconsin were admitted into the Union, and "middle of the main channel of the Mississippi River," as used in the enabling acts of Missouri and Iowa, all being descriptive of the boundaries of those states, were held synonymous terms, and to mean the middle of the main navigable channel, or channel most used, and not the middle of the great bed of the stream, as defined by the banks of the river.[5]

410. Meander-lines do Not Always Determine the Boundaries.—Many cases hold that a meander-line of a stream is run by government surveyors for the purpose of determining approximately the windings of the stream or shore, and to determine the quantity of land in the survey, not for the purpose of making it a boundary-line;[6] the latter being defined in all cases by the waters themselves. The meander-line merely determines the sinuosities of the stream or body of water, and is not a boundary.[7] In a government survey it does not limit the boundaries of a Mexican grant.[8]

Where an irregular tract of land abuts upon a stream, and a meander-line

[1] 1 Amer. & Eng. Ency. Law 189.
[2] Northern Pine-land Co. *v.* Bigelow (Wis.), 54 N. W. Rep. 496.
[3] *Ex parte* Davidson (C. C.), 57 Fed. Rep. 883.
[4] Nebraska *v.* Iowa, 12 Sup. Ct. Rep. 396; Denny *v.* Cotton (Tex.), 22 S. W. Rep. 122.
[5] Iowa *v.* Illinois, 13 Sup. Ct. Rep. 239. *See* Oakland *v.* Oakland W.-f. Co. (Cal.), 50 Pac. Rep. 277.
[6] Fuller *v.* Dauphin, 124 Ill. 542 [1888]; Railroad Co. *v.* Schurmeir, 7 Wallace 272 [1868]; Hardin *v.* Jordan, 11 Sup. Ct. Rep. 808, 838; s. c., 140 U. S. 371; Coburn *v.* San Mateo Co. (C. C.), 75 Fed. Rep. 520.
[7] Schlosser *v.* Crookshank (Iowa), 65 N. W. Rep. 344.
[8] Coburn *v.* San Mateo County (C. C. N. D. Cal.), 75 Fed. Rep. 520.

* *See* Secs. 401–420, *supra*.

is run ostensibly along this shore-line for the purpose of fixing the area of such tract, the real boundary of the tract is the shore-line, and not the meander-line.[1] The boundary-line is the actual water-line, unless the contrary clearly appears from the deed itself,[2] or unless the notice and other proceedings show that such was the purpose of the survey.[3] In the absence of evidence of a reservation in the patent or an assertion of title by the government to land lying between the meander-line of a lake, as established by its surveyors, and the shore-line of the lake, evidence *aliunde* is inadmissible to show that the meander-line was intended as the boundary of the adjoining patent.[4]

The fact that a stream was not meandered by United States surveyors raises a presumption that it was not navigable.[5]

A call "thence meandering down the bank of the river" makes the river one of the boundaries of the land.[6] When, in a government survey, a meander-line was run along the east bank of a slough but was not marked on the government map, and the slough was marked on the map as the west boundary of the land, it was held that the meander-line was not the boundary, and that the description included an island lying between the lines described and the middle of the slough, such island never having been surveyed or platted by the general government.[7]

Where, under a patent from the United States, the state acquires title to a section of land partly within and partly without a meander-line, and the dry land without the meander-line is divided into lots, and there is nothing to indicate that it was intended to bound the lots by such meander-line, a patent from the state of one of the lots, describing it by its number and section, conveys the whole thereof to the opposite section-line.[8]

But where lands are conveyed by reference to the official plat of a survey, which shows a meander-line along marshy lands extending to Lake Erie, the meander-line was held to be the boundary-line;[9] and where a state patent of swamp-lands describes the land conveyed by subdivisions, according to the United States survey, and continues the description by giving the number of the swamp-land survey, and saying that it is more particularly described in the field-notes of the survey, and then recites the field-notes, the land con-

[1] Heald *v.* Yumisko (N. D.), 75 N. W. Rep. 806 [1898].

[2] Sizor *v.* Logansport, 50 N. E. Rep. 377.

[3] Tolleston Club *v.* Clough (Ind. Sup.), 43 N. E. Rep. 647.

[4] Schlosser *v.* Crookshank (Iowa), 65 N. W. Rep. 344.

[5] Clute *v.* Briggs, 22 Wis. 607 [1868].

[6] Heilbron *v.* Kings River, etc., Co. (Cal.), 17 Pac. Rep. 933 [1888]. *And see* Steinbuchel *v.* Lane (Kans.), 51 Pac. Rep. 886 [1898].

[7] Fuller *v.* Dauphin (Ill.), 16 N. E. Rep. 917 [1888]; Horne *v.* Smith, 15 Sup. Ct. Rep. 988; Bland *v.* Smith (Tex.), 43 S. W. Rep. 49 [1897]. *See* People *v.* Warner (Mich.), 74 N. W. Rep. 705 [1898]. *But see* Barnhart *v.* Ehrhart (Oreg.), 54 Pac. Rep. 195 [1898].

[8] Tolleston Club *v.* State (Ind. Sup.), 38 N. E. Rep. 214; Stoner *v.* Rice (Ind.), 22 N. E. Rep. 968.

[9] Niles *v.* Cedar Pt. Club, 85 Fed. Rep. 45. *But see* Horne *v.* Smith, 15 Sup. Ct. Rep. 988, *and* Bland *v.* Smith (Tex.), 43 S. W. Rep. 49.

veyed is limited to that actually surveyed in the field and described in the field-notes, even if the survey did not include all the land in the subdivisions.[1]

When, however, the meander-line was not run along a bayou some distance from the river, and the land between the bayou and the river, though in existence at the time that the survey was made, was not surveyed, it was held that such land did not pass by a conveyance from the government of the surveyed tract.[2] If the description in the deed contains no mention or intimation that the land borders upon a stream, and it is not shown in the plat from which the deed was made, then the grantees may not introduce evidence relating to the title and ownership of said land to show that they are riparian owners.[3]

411. Should Area Given Include Bank and Bed of Stream?—In giving the area of a field or estate the question arises, shall the land covered by water and that of the banks or shores be included? If the bed and banks be a part of the estate described and clearly within the bounds surveyed, doubtless the ordinary surveyor would include them, otherwise not. Without the use of stadia measurements or resorting to triangulation the determination of the middle line of a fair-sized stream is a task, and unless authorized to determine it and make a plat thereof a surveyor will not go to such trouble and expense. Indeed, in ordinary cases the interests at stake are hardly worth the time, trouble, and expense, and it may be doubted if a client would wish to pay for the labor involved in determining the exact area.

It has been held that under a conveyance of land one side of which was bounded by a public navigable river, the quantity determined as conveyed should include all that land between the top of the bank and the ordinary stage of the water.[4]

In an action, by the grantee in a deed running "to a point" in Long Island Sound, to recover for a deficiency in the acreage of the land conveyed, on the ground that the deed could only convey to the high-water line of the shore, it will not be presumed, in the face of the description in the deed definitely calling for the low-water line as the boundary, that the grantor had no title to the shore, since the common-law rule that the title to the shore is in the state does not exclude the possibility of title in the grantor derived from the state or by prescription.[5]

A deed of land described as "all that tract, being part of lot 4 on which the said B. now lives, beginning at a point on a river, thence up the river,"

[1] Mahon *v* Richardson, 50 Cal. 333 [1875]; The specific description will hold. Prentice *v.* Duluth, S. & F. Co. (C. C. A.), 58 Fed. Rep. 437; Pond *v.* Minnesota I. Co. (C. C.), 58 Fed. Rep. 448; Barnhart *v.* Ehrhart (Oreg.), 54 Pac. Rep. 195; Niles *v.* Cedar Pt. Club (U. S. C. C.), 85 Fed. Rep. 45; Harrison *v.* Stipes (Neb.), 51 N. W. Rep. 976 [1892].

[2] Glen *v.* Jeffrey (Ia.), 39 N. W. Rep. 160 [1888].

[3] Trustees *v.* Schroll (Ill.), 12 N. E. Rep. 243 [1887].

[4] Hess *v.* Cheney (Ala.), 3 So. Rep. 791 [1888]; *semble*, State *v.* Eason (N. C.), 19 S. E. Rep. 88.

[5] Oakes *v.* De Lancey (N. Y. App.), 30 N. E. Rep. 974.

etc., by various courses, "thence north a certain distance to Fish Lake, to the north line of the said lake, thence along the same, etc., to the place of beginning," containing 100 acres and being the number of acres intended to be conveyed, carries the title to the part of the lot *under the lake*, though this amounted to 40 acres and the land exclusive of this amounts to 103 acres.[1]

Whether or not the area between the center of a street and the exterior line is to be included as comprising a part of the area mentioned in the deed must be one of intention of the parties. It has been held that where land was described as "commencing on the southeast corner of lot 9 and running thence northeasterly along the Indiana boundary-line, which boundary-line was a highway, . . . intending hereby to convey one acre of land without reference to metes and bounds as above described," the southwest side of the tract conveyed was the center-line of the highway, even though that only gave to the grantee one acre including the strip subject to the easement of the highway.[2]

412. The Question of Boundaries is Determined by the Laws of the State.—Whether the title of a proprietor of land on the margin of a navigable river extends to high-water mark, low-water mark, or the middle of the stream is not a Federal question, though he claim under a grant from the United States, but is to be determined by the laws of the state in which the land is situated.[3]

Where the law of the state, as an incident to the ownership of riparian lands, attaches thereto the legal title to submerged lands, to the thread of the stream, as in Michigan, such title will accrue to one who receives from the United States a patent to the riparian lands.[4]

413. Law of Boundaries Affected by Early Settlements.—The laws of New York in regard to boundaries on waters are affected by the doctrine of the civil law, which prevailed in the Netherlands, from whose government grants for the early-settled parts of the state were derived. This is true especially of the Hudson and Mohawk rivers, upon which the rights of riparian owners are distinguishable from those of owners upon other navigable waters of the state.[5] Louisiana has also laws which are modifications of the civil law existing under French rule; from which government tenures are held, and the laws of Pennsylvania are peculiar in their application to land, and the rights inherent thereto.

The general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation. Yet in New York state it is the rule that when the interests of the whole people require an

[1] Wilcox *v.* Bread, 92 Hun 9.
[2] Henderson *v.* Hatterman (Ill. Supp.), 34 N. E. Rep. 1041.
[3] Webb *v.* City of Demopolis (Ala.), 13 So. Rep. 289.
[4] Scranton *v.* Wheeler (C. C. A.), 57 Fed. Rep. 803.
[5] Smith *v.* Rochester, 92 N. Y. 463 [1883]; People *v.* Canal Apprs., 33 N. Y. 461, *distinguished.*

improvement of the water-front of a navigable stream for the benefit of commerce, the state may make such improvements upon the tide-water front without compensating the riparian proprietor, except by giving him a pre-emptive right to purchase in case of a sale.[1]

Although, as against individuals, riparian owners have special rights to the tideway between high- and low-water mark which are recognized and protected by law as against the general public, they have no rights that do not yield to commercial necessities, except the right of pre-emption when conferred by statute, and the right to wharfage when protected by a grant and covenant on the part of the state; and any grant of land on tide-water is subject to an implied reservation of the right to improve the water-front to aid navigation, for the benefit of the general public, without compensation to the riparian owner.[1]

A grant to freeholders, by the governor of the colony of New York, of land bounded on one side by a river was held not to carry accretions to the land, where the tideway of the river was granted by royal charter to the city of New York. Where the tideway of a river was granted to New York City by royal charter, and the state afterwards increased the grant to an exterior street, under water, to be laid out by the city, an owner of upland property bounded by the river has no riparian rights for which compensation must be made when the city fills in the tideway in front of the property for the purpose of creating the street.[2]

The Hudson River Railroad Company, under its charter authorizing the construction of its road along the east shore of the Hudson River, cannot be regarded as an adjacent owner within Rev. St. (7th ed.), p. 573, § 67, forbidding grants of lands under water "to any person other than the proprietor of the adjacent land," and therefore cannot maintain ejectment against a person claiming under a subsequent state grant of such lands, the use of which does not interfere with the operation of the company's railway.[3]

The construction by the owner of land bounded by navigable tide-water of a marine railway for the purpose of hauling up boats is not an adverse possession of the land below high-water mark, within Code Civil Proc., § 368, of New York.[4]

The words "together with all water privileges, rights, and immunities of the said party of the first part therewith connected," taken in connection with the fact that there were no water privileges, etc., connected with the tract save those resulting from the river being the boundary on one side, render it absolutely certain that it was not intended that the purchaser's right should terminate at the water's edge.[5]

[1] Sage *v.* City of New York, 154 N. Y. 61, 41 N. Y. Supp. 939 [1896–7.]

[2] Sage *v.* City of New York (Sup.), 41 N. Y. Supp. 938; Towle *v.* Remsen, 70 N. Y. 303 [1877].

[3] Rumsey *v.* Railroad Co., 114 N. Y. 423; New York Cent. & H. R. R. Co. *v.* Aldridge (Sup.), 16 N. Y. Supp. 674.

[4] De Lancy *v.* Piepgras (N. Y. App.), 33 N. E. Rep. 822.

[5] Piper *v.* Connolly, 108 Ill. 646 [1884].

414. Boundaries on Navigable Waters.*—The law of boundaries upon non-tidal navigable waters and streams varies in different states, the courts of some of which hold that the riparian owners own only to the water-mark (high or low), and others hold that they own the bank and bed to the middle line of the stream, subject, however, to an easement of the public to certain reasonable uses of the waters of the stream. Those states in which the courts hold that riparian owners are entitled to the ownership of the banks and bed of a navigable stream to the middle thereof are the following: Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New York, North Carolina, Ohio, Rhode Island, South Carolina, Vermont, Wisconsin, and the foreign countries England and Ireland.[1]

In Alabama the title of an owner of land bordering on a navigable stream extends to low-water mark, ending only where the right to the use of the water as a navigable stream begins.[2] In Arkansas title extends to high-water mark, and not to the middle of the stream.[3] In Florida the land below high-water mark does not necessarily pass to a grantee of the upland as appurtenant to the latter.[4] In Missouri title carries only to the water's edge.[5] In Montana title extends to ordinary low-water mark. A riparian owner may, in ejectment, recover land lying between high- and low-water marks from one in possession not claiming rights as a navigator or fisherman.[6]

In New York state a riparian owner has the right to construct wharves on his water-front for his own use and benefit, subject to public regulation, and such right cannot be taken for public use except by condemnation proceedings as prescribed by law.[7]

The state of Washington, (Const., art. 17, § 2), disclaims all title to tide-lands patented by the United States. It cannot, therefore, assert title to land situated below the line of ordinary high tide, but within the meander-line, which was patented to plaintiff by the United States; said land being within the calls of the patent, and described in the official plat, and the survey and field-notes accompanying the same, by courses and distances.[8]

Where the United States has made grants, without reservation or restriction, of public lands bounded on streams or other waters, the question whether the lands forming the beds of the waters belong to the state or to the owners of the riparian lands is to be determined entirely by the law of

[1] 16 Amer. & Eng. Ency. Law 253–257; Day *v.* Pittsburgh, etc., R. Co. (Ohio), 22 The Reptr. 533 [1886].

[2] Webb *v.* City of Demopolis (Ala.), 13 So. Rep. 289.

[3] Railway Co. *v.* Ramsey, 53 Ark. 314; Wallace *v.* Driver (Ark.), 33 S. W. Rep. 641.

[4] Axline *v.* Shaw (Fla.), 17 So. Rep. 411.

[5] Perkins *v.* Adams (Mo. Sup.), 33 S. W. Rep. 778.

[6] Gibson *v.* Kelly (Mont.), 39 Pac. Rep. 517.

[7] Buffalo *v.* Delaware, L. & W. R. Co. (Sup.), 39 N. Y. Supp. 4.

[8] Cogswell *v.* Forrest (Wash.), 43 Pac. Rep. 1098.

* *See* Secs., 231–250 *supra*.

the state in which the lands lie. When it has disposed of the lands bordering on a meandered lake by patent, without reservation or restriction, it has nothing left to convey, and any patent thereafter issued for land forming the bed or former bed of the lake is void and inoperative.[1]

A patent of the United States conveying land lying upon the borders of a navigable river within the boundaries of a state conveys no title to land lying under the stream, since the United States has no title thereto.[2]

[1] Lamprey *v.* Metcalf (Minn.), 53 N. W. Rep. 1139.

[2] Scranton *v.* Wheeler (C. C. A.), 57 Fed. Rep. 803.

CHAPTER XXIII.

BOUNDARIES ON LAKES AND PONDS.

421. Boundaries on Natural Lakes and Ponds.—The subject of the boundaries of natural lakes and ponds is a difficult one, and is in confusion at the present time. The various state courts are not yet agreed upon a doctrine on which to base their decisions, and the adoption of different grounds for deciding the cases which have so far come before the courts makes it difficult to lay down any general rule which will apply in all states and in all cases.

"The common law of England, which presumes the boundary-line of two estates separated by a tideless navigable river to coincide with the middle line of the stream, does not apply to the great fresh-water lakes of this country. Our large fresh-water lakes or inland seas are wholly unprovided for by the laws of England. In these there is neither flow of tide nor thread of the stream; and local laws have assigned the shores, down to the ordinary low-water mark, to the riparian owners, and the beds of the lakes, with the islands therein, to the public."[1] Upon this the courts are fully agreed; and the rule can be laid down that where land is bounded upon an inland fresh-water lake so large as to be called a "great lake" or "inland sea" the proprietors of such lands hold to ordinary low-water mark, and grants bounded by such waters extend to that line and no further.[2]

It has been held that unless otherwise expressed in the grants, the land lying upon Lake Champlain, which covers nearly 1000 square miles and is navigable for 150 miles, extends to the low-water mark, subject to the servitude of the public for the purpose of navigation up to high-water mark.[3]

Failure of a deed, by one owning to low-water mark on a lake, to mention the lake as a boundary will not overcome the presumption of the intent to convey to low-water mark, where the boundary given in the deed is sub-

[1] Canal Commissioners *v.* People, 5 Wend. (N. Y.) 423, 447; Hathorn *v.* Stinson, 1 Fairf. 238.

[2] Gould on Waters, § 203; Smith *v.* Rochester, 92 N. Y. 463; Sloane *v.* Biemiller, 34 Ohio State 492; Lincoln *v.* Davis, 53 Mich. 375; Seaman *v.* Smith, 24 Ill. 521; Bigelow *v.* Nickerson (C. C. A.), 70 Fed. Rep. 113.

[3] Commissioners *v.* Kempshall, 26 Wend. (N. Y.) 404; Champlain, etc., Ry. Co. *v.* Valentine, 19 Barb. (N. Y.) 491; Ill. Cent. R. Co. *v.* State, 13 Sup. Ct. Rep. 110.

stantially coincident with the low-water mark, unless a contrary intention is manifest from the language of the deed.[1]

In New Hampshire it is held that where a grant runs to and is bounded of a lake or large body of standing fresh water, the grant extends only to the water's edge.[2] Long Pond at Concord, whose bed contains 160 acres, being navigable, under American common law, was held the property of the state and available for public use.[3] In Massachusetts a grant bounded by a great pond or lake which is public property extends to low-water mark.[4] A similar doctrine prevails in Vermont, and the rule applies to a grant bounded by creeks which are substantially arms and inlets of the lake;[5] and in Maine—but whether or not a lot of land bounded on a lake is limited to the margin of the lake depends on the manner in which the lake was formed.[6] The Supreme Court of Illinois has held that riparian owners on Lake Michigan own to the line where the water usually stands when unaffected by any disturbing cause.[7]

In Wisconsin a small stream that spread into a body of water 35 to 65 rods wide and 3 miles long, and then reappeared as a stream, its surface being covered with water in the spring and fall, and marshy and partially dry in summer, and which was filled with rushes and wild rice, and was navigable only by small skiffs, but without any defined channel or current during the greater part of the year, and which had been meandered by the government surveyors, was held not a watercourse, but a meandered lake, and hence the riparian proprietors owned only to the water-line.[8]

The common law as to the dominion, sovereignty, and ownership of lands under tide-waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes, and in this country such sovereignty and ownership belongs to the states respectively within whose borders such lands are situated, subject always to the right of Congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce.[9]

The confusion arises when questions come before the courts dealing with boundaries on lakes which cannot fairly be called "great lakes." In such cases the courts adopt different grounds for deciding the cases before them. Thus the courts of some states decide these questions by applying to lakes and ponds the same rule that they apply to streams, and base their decisions upon the navigability or non-navigability of the body of water. In some

[1] Slauson *v.* Goodrich Transp. Co. (Wis.), 69 N. W. Rep. 990.
[2] State *v.* Gilmanton, 9 N. H. 461, 463.
[3] Concord Mfg. Co. *v.* Robertson (N. H.), 25 Atl. Rep. 718; State *v.* Company, 49 N. H. 240, 250.
[4] Paine *v.* Woods, 108 Mass. 160.
[5] Fletcher *v.* Phelps, 28 Vt. 257; Janeway *v.* Barrett, 38 Vt. 316.
[6] Dillingham *v.* Smith, 30 Me. 370; Wood *v.* Kelley, 30 Me. 47.
[7] Seaman *v.* Smith, 24 Ill. 521.
[8] Ne-Pee-Nauk Club *v.* Wilson (Wis.), 71 N. W. Rep. 661; 12 Amer. & Eng. Ency. Law 650, 651.
[9] Ill. Central R. Co *v.* State, 13 Sup. Ct. Rep. 110; People *v.* Kirk (Ill.), 45 N. E. Rep. 830; People *v.* Silberwood (Mich.), 67 N. W. Rep. 1087.

states the decisions have been based upon ancient ordinances and statutes in force in those states, and still other courts have decided the cases before them by citing such decisions, although in their own states there were no such ordinances, as formed the bases of the decisions cited.

Where states in deciding cases brought before them have not considered the question from the point of view of the navigability or non-navigability of the body of water, the weight of the decisions in this country seems clearly to be that where the monument called for in the grant is a natural lake or pond the boundary-line is the ordinary low-water line of such lake or pond.[1]

In Michigan the settled law is declared to be that the boundaries of riparian owners extend to the middle line of inland waters;[2] and in New Jersey in a case of a lake three miles by one mile.[3]

The strong tendency of modern cases seems to be to base the decision on the navigability or non-navigability of the lake or pond, and to establish the rule that if the body of water is navigable, land bounded on such a lake or pond will extend only to ordinary low-water mark, but if it be not navigable, then it will extend to the middle thread of the lake or pond.[4]

Where lands have been surveyed and laid out originally by the United States Government, riparian owners of *non*-navigable lakes and ponds whose shores were meandered by the government surveyors do *not* as a general rule take to the center of the lake or pond, but only to low-water mark.[5] The contrary rule is held in some states, which makes the boundary the center of the lake or pond.[6] If the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity, and the patentee takes the fee to the low-water line only.[7] The meander-line is not regarded as the boundary of lot-owners, but to have been run for topography, the courts giving riparian rights to the abutting landowners.[8] The fact that the number of acres recited

[1] Bradley *v.* Rice, 13 Me. 198; Waterman *v.* Johnson, 13 Pick. 261; Payne *v.* Woods, 108 Mass. 160; State *v.* Gilmanton, 9 N. H. 461; Fletcher *v.* Phelps, 28 Vt. 257; McBurney *v.* Young (Vt.), 32 Atl. Rep. 492; Diedrich *v.* N. W. Ry. Co., 42 Wis. 248. *See also* Noyes *v.* Board of Sup'rs, 73 N. W. Rep. 480 [1897]; Fuller *v.* Shedd, 161 Ill. 462; Trustees of Schools *v.* Schroll, 120 Ill. 509; Olson *v.* Huntamer (S. D.), 61 N. W. Rep. 479; Noyes *v.* Collins (Iowa), 61 N. W. Rep. 250.

[2] Weber *v.* Pere Marquette Co., 62 Mich. 626.

[3] Cobb *v.* Davenport, 32 N. J. Law 369.

[4] 4 Am. & Eng. Ency. Law 833, 834, *and cases cited;* Lembeck *v.* Nye, 47 Ohio St. 336.

[5] Fuller *v.* Shed (Ill.), 44 N. E. Rep. 286; Edwards *v.* Ogle, 76 Ind. 302; Noyes *v.* Collins (Iowa), 61 N. W. Rep. 479; Noyes *v.* Board (Iowa), 73 N. W. Rep. 480. *But see* Schlosser *v.* Crookshank (Iowa), 65 N. W. Rep. 344, *and* McBurney *v.* Young (Vt.), 32 Atl. Rep. 492, *ordinary low-water mark.*

[6] Lamprey *v.* Metcalf (Minn.), 53 N. W. Rep. 1139; Olson *v.* Huntamer (S. D.), 61 N. W. Rep. 479; Forsythe *v.* Small, 7 Biss. (U. S.) 201, 205 [1876]. *And see* Kirwan *v.* Murphy (U. S. C. C. Minn.), 85 Fed. Rep. 275, *and* 12 Amer. & Eng. Ency. Law 649.

[7] Lamprey *v.* State, 52 Minn. 181; Lamprey *v.* Metcalf (Minn.), 53 N. W. Rep. 1139; Niles *v.* Cedar Pt. Club (U. S. C. C.), 85 Fed. Rep. 45; Wayzata *v.* Gt. N. Ry. Co. (Minn.), 52 N. W. Rep. 913, *one side of a street;* Schlosser *v.* Crookshank (Iowa), 65 N. W. Rep. 344, *to high-water line.*

[8] Knudson *v.* Omanson (Utah), 37 Pac. Rep. 250; Schlosser *v.* Crookshank (Iowa), 65 N. W. Rep. 344; Kirwan *v.* Murphy (U. S. C. C. Minn.), 83 Fed. Rep. 275; Lally *v.* Rossman (Wis.), 51 N. W. Rep. 1132; Yates *v.* Milwaukee (U. S.), 10 Wall. 497.

in the government patent corresponds with the quantity within the meander-line will not prevent the patentee from claiming the land between the meander-line and the shore-line.[1]

When land has been surveyed by the government and subdivided without meandering the shores of a lake or pond contained therein, and without reservation of the lake or pond, and the section-lines are run straight across from shore to shore, the purchaser of sections or subdivisions acquires title to that portion of the bed of the lake included in the subdivision.[2]

The United States Supreme Court states the rule to be that by the common law, under a grant of lands bounded on lakes or ponds which are not tide-waters and are not navigable, the grantee takes to the center of the lake or pond ratably with other riparian proprietors, if there be such;[3] and a late case in New York says that the presumption in that state is that lands under the waters of small, inland, non-navigable ponds and lakes belong to the proprietors of the adjoining lands, and the same rule applies in the legal construction of grants of land bounded on fresh-water streams.[4]

This case substantially overrules an earlier case[5] which decided that a boundary of land upon a fresh-water pond did not go below the low-water mark. The New York courts have not been consistent in deciding cases before them by taking as a basis of their decisions the navigability or non-navigability of the lake or pond. Thus in one case it was shown that the lake was navigable in fact and had been navigated for over thirty years, yet it was held that the riparian owners held title to the center of the bed of the adjoining navigable body of water.[6]

It would seem from a review of the cases on this subject in this country that no very definite rule has yet been established for their determination, and that each case must be decided according to the facts of that particular case.

It should be noted that where an estate is described and bounded on a natural pond it will not be limited by the first water reached, as a creek, inlet, or cove, but will extend to the body of the pond proper.[7]

A lot of land was conveyed and described as bounding on one end upon a pond. It appeared that there was a narrow cove or arm of the pond extending from the pond across the lot, and that if the land conveyed was limited by this cove the lines would not correspond with those of the adjoining lots, and there would remain a portion of the land not conveyed between the cove

[1] Schlosser *v.* Crookshank (Iowa), 65 N. W. Rep. 344.

[2] Stoner *v.* Rice (Ind.), 22 N. E. Rep. 968; Kean *v.* Roby (Ind.), 42 N. E. Rep. 1011. *See* Edwards *v.* Ogle, 76 Ind. 302; Ross *v.* Faust, 54 Ind. 471; Ridgeway *v.* Ludlow, 58 Ind. 248; Yates *v.* Milwaukee (U. S.), 10 Wall. 497.

[3] Hardin *v.* Jordan, 140 U. S. 371.

[4] Gouverneur *v.* National Ice Co., 134 N. Y. 355, *reversing* 11 N. Y. Supp. 87; Crooked Lake Nav. Co. *v.* Kenha Nav. Co., 4 N. Y. St. Rep. 380, *affirmed in* 115 N. Y. 667.

[5] Wheeler *v.* Spinola, 54 N. Y. 377.

[6] Smith *v.* Rochester, 92 N. Y. 463.

[7] Nelson *v.* Butterfield, 21 Me. 220. *And see* Maŭser *v.* Blake, 62 Me. 38.

and the pond. It was therefore held that the land extended across the cove to the main body of water called the pond.[1]

An act authorizing the board of commissioners to extend its driveway over and upon the bed of Lake Michigan, and to sell and convey to the adjoining shore-owners the submerged lands which might be reclaimed in extending such driveway, was a valid exercise of legislative discretion, since it did not interfere with the rights of navigation and fishing.[2]

Riparian rights proper are held to rest upon title to the bank of the body of water, and not upon title to the soil under the water, as they are the same whether the riparian owner owns the soil under the water or not. Accretion and reliction are held not to be riparian rights.[3]

A conveyance of land by metes and bounds by the owner of land extending to the low-water mark on a lake does not entitle the grantee to take to such low-water mark if there remains a strip of land between that conveyed and the waters of the lake at low-water mark.[4]

The title to an island situated within 100 rods from the opposite upland, there being no channel between the island and mainland at low water, does not extend, unless by special grant, to a flat circling the island, except on the side towards the sea. Nor is this rule varied by parole proof that there had been anciently a channel at low water between the mainland and the island, which had been filled up by the slow process of accretion.[5]

422. Boundaries on Artificial Lakes and Ponds.—Land bounding upon a lake or pond which has been made artificially by backing up the waters of a stream extends *prima facie* to the middle line of the original stream.[6] A grant bounded on, or by, an artificial pond, and not expressly or by clear implication by the margin of it, extends to the middle thread of the original stream as if no pond existed. This was held even where the pond had been in existence two hundred years.[7] Whether or not a deed to land described as "bounded on" an artificial lake conveyed an interest in the lake may be shown by an antecedent contract with the grantor to buy the land under the lake; such agreement being held proof of the intention of the parties to convey only to the margin of the lake.[8]

Where a *natural lake or pond* has been enlarged artificially and its surface is thereby raised, the boundary-line of land described as bounded by such lake or pond remains the same as if the land were bounded upon the pond in its natural state, unless the pond so created has been so long kept up as to have become permanent and to have acquired another well-defined boundary.[9]

[1] Nelson *v.* Butterfield, 21 Me. 220. *And see* Maŭser *v.* Blake, 62 Me. 38.

[2] People *v.* Kirk (Ill. Sup.), 45 N. E. Rep. 830.

[3] Diedrich *v.* N. W. R. Co., 42 Wis. 298.

[4] Slauson *v.* Goodrich Transp. Co. (Wis.), 69 N. W. Rep. 990.

[5] Babson *v.* Taintor (Me.), 10 Atl. Rep. 63 [1887].

[6] Maŭser *v.* Blake, 62 Me. 38; Phinney *v.* Watts, 9 Gray (Mass.) 269.

[7] Mill River Mfg. Co. *v.* Smith, 34 Conn. 462.

[8] Fowler *v.* Veerland (N. J.), 14 Atl. Rep. 116 [1888].

[9] Payne *v.* Woods, 108 Mass. 160.

Most of the cases upon this point have been decided in states which hold that land bounded by a natural pond or lake extends only to the low-water mark,[1] and so the rule has been stated that if a natural lake or pond is raised or lowered artificially the boundary-line will remain at the original low-water mark.[2] The question does not seem to have arisen in any state which holds the bed of non-navigable lakes and ponds to belong to the adjoining owners. In those states the consistent rule would be that land bounded on an artificially raised pond will extend to the low-water mark of the pond in its natural state if navigable, and to the middle thread of the pond if, in its natural state, it be non-navigable. A conveyance of "all my estate to the north of the mill-pond, . . . including the mill-stream and mill and mill-pond, with all its privileges and appurtenances, and to shut the mill-dam at the south side of said mill-pond," did not convey any land beyond high-water mark.[3]

Whether or not a deed to land described as "bounded on" an artificial lake conveyed an interest in the lake may be shown by an antecedent contract with the grantor to buy the land under the lake; such agreement being held proof of the intention of the parties to convey only to the margin of the lake.[4]

423. Shore, Beach, Bank, or Water's Edge of Lakes and Ponds.—The rules laid down in the preceding sections apply when the call for boundary is a lake or pond, or where the land is said to be bounded *by* or *on* or *running along* the lake or pond. Different rules prevail when *shore, bank,* or *water's edge* and similar words are used, for these words are generally held to show a presumption that the parties have waived the ordinary rule and that they meant the land to run to the ordinary low-water mark and no further. As said in an Indiana case,[5] "The conveyance to a riparian proprietor may be drawn in terms so restrictive as to limit his title to the bank as a boundary when, but for such restrictions, it would extend to the thread of the stream." *

Deeds in a chain of title plainly indicating that the boundary of the land is the bank of a pond pass no title to the land under the water, either to the grantees in such deeds or to their grantees and assigns. A boundary of land *on the edge* of the pond is not a boundary *by a stream* which may change by gradual washings and deposits; but the boundary is limited by the definite boundary without regard to the contingent subsidings of the water constituting the pond and thereby leaving the land dry.[6] The term *margin of the lake* is a term of unequivocal import, meaning the line where the earth and water meet around the lake. By the use of these words the parties have

[1] Payne *v.* Woods, *supra.*
[2] 4 Amer. & Eng. Ency. of Law 837.
[3] Roberts *v.* Baumgarten (N. Y.), 18 N. E. Rep. 96 [1889].
[4] Fowler *v.* Veerland (N. J.), 14 Atl. Rep. 116 [1888].
[5] Ross *v.* Faust, 54 Ind. 471.
[6] Holden *v.* Chandler, 61 Vt. 291.

* *See* Secs. 405-7, *supra.*

declared their intention to make, not the middle, but another part of the lake —the edge of the water—the boundary-line. No other construction can be given to the words the parties themselves have chosen without doing violence to their meaning; and an intention contrary to the one expressed by the very words selected by the parties themselves cannot be presumed.[1]

The grantee of a deed that conveyed "the western portion" of certain lands "bounded on the south by C. lake, and meandering along the water's edge eastward to a stake at the lake low-water mark," acquired thereby no title to any of the portion covered by water;[2] and it was held in New York that the boundary on an artificial pond when described "to commence at a stake near the high-water mark of the pond, and to run thence along the high-water mark of the said pond to the upper end of the pond," was fixed and permanent, and that the boundary did not change in consequence of accretion or of gradual receding of the waters. This decision was doubtless due to the nature of the body of water, the high-water mark of which could be changed by the grantor by adjusting the height of his dam. It was founded on the evident intention of the parties. The court considered the boundary fixed.[3]

When an artificial pond, which had been in existence for more than forty years, and which had thus become a permanent body of water, and was still kept up and maintained as such, and which had a margin of land between its high- and low-water marks, was described as a boundary, it was held that the land so conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the execution of the deed.[4]

424. Receding of Waters of Lakes and Ponds.—This topic is usually considered in the larger treatises on real property under the head of accretion. By the term "accretion" is meant the gradual and imperceptible accumulation of land by natural causes, as out of the sea or a river. Accretion of land is of two kinds: (1) by *alluvium*, which is that increase of the earth on a shore or bank of a river, or on the shore of the sea, by the force of the water, as by a current or by waves, which is so gradual that no one can judge how much is added at each moment of time; (2) by *dereliction*, which consists in the gaining of land from the water in consequence of the water shrinking back below its usual mark. Most of the additions to the shore of lakes and ponds are caused by the dereliction or receding of the waters of such lakes and ponds.*

Land formed by dereliction or gradual subsidence of the water belongs to

[1] Lembeck *v.* Nye, 47 Ohio State 336, *citing* McCulloch *v.* Aten, 2 Ohio 308; Lamb *v.* Richets, 11 Ohio 311; Hopkins *v.* Kent, 9 Ohio 13; Gould on Waters, § 199.

[2] Brophy *v.* Richeson, 137 Ind. 114.

[3] Cook *v.* McClure, 58 N. Y. 437.

[4] Boardman *v.* Scott (Ga.), 30 S. E. Rep. 982 [1897].

* *See* Secs. 371-400, *supra*.

the owner of the land to which it is an addition, and this doctrine is equally applicable to tide-waters and to non-tidal rivers and lakes. If the waters in a navigable lake recede gradually and insensibly, the land gained belongs to the adjacent riparian owners; but if the receding be sudden, the increase belongs to the state. It was so held in a case in North Carolina wherein it was proved that the lake upon which the lands in question were bounded was navigable, and the court said: "If the receding of the lake was sudden and sensible, the land which it had covered and which by its dereliction became dry would not be and ought not to be included in defendant's grant;[1] but if the waters receded gradually and insensibly, the lake ought to be considered one of the defendant's boundaries." It is necessary that the fact be established whether the water of the lake receded imperceptibly or not from the land in question, because on that question the rights of the parties depend.[2] Gradual recession of the waters of a meandered lake gives riparian proprietors the right to the new land by following the recession of waters to their edge; but a considerable body of new land suddenly or perceptibly formed by reliction belongs to the state,[3] as by a river cutting into it.

A timber-culture entryman who has obtained a patent from the government acquires in reliction to the center of the lake occasioned by its drying up after the day of his entry;[4] and the patentee of a fractional subdivision bordering on a navigable lake which has been meandered in the government surveys takes title to all land beyond the meandered line formed by the gradual subsidence of the lake, since the boundary is not the meandered line, but the water-line.[5]

A railroad company does not, it seems, acquire by such reclamation an absolute fee in the lands reclaimed, or any right of use, disposal, or control, except for a right of way and for railroad purposes; nor does it thereby acquire any rights, as a riparian owner, to reclaim still further lands from the lake for its use, or for the construction of piers, docks, and wharves in furtherance of its business.[6] In respect to lots bordering on the lake, and to which the company acquired the fee by purchase, it does become vested with riparian rights, and is entitled to fill up shallow waters of the lake, and to construct piers, wharves, docks, and slips not extending beyond the point of navigability.[7]

When the waters of a lake are lowered by an act of public officers in

[1] Fuller *v.* Shedd, 161 Ill. 462; Noyes *v.* Collins, 92 Iowa 566.

[2] Murry *v.* Sermon, 1 Hawks' R. 56. *See* Noyes *v.* Board (Iowa), 73 N. W. Rep. 480 [1897].

[3] Fuller *v.* Shedd, 161 Ill. 462; Noyes *v.* Collins, 92 Iowa 566.

[4] Olson *v.* Huntamer (S. D.), 61 N. W. Rep. 479.

[5] Knudson *v.* Omanson (Utah), 37 Pac. Rep. 350. *But see* Hodges *v.* Williams, 95 N. C. 331, *and* Noyes *v.* Board of Supervisors of Harrison County, 73 N. W. Rep. 480.

[6] Illinois Cent. R. Co. *v.* State, 13 Sup. Ct. Rep. 110.

[7] Illinois Cent. R. Co. *v.* State, 13 Sup. Ct. Rep. 110, *affirming* 33 Fed. Rep. 730. See dissenting opinions of Justices Shiras, Gray, and Brown.

making an improvement, riparian owners do not lose their rights in the lake, but are entitled to free access to the waters of their lands.[1] *

After granting land bordering on a meandered non-navigable lake the Federal Government cannot grant the land lying under the water or that formed by a recession of the waters, and thereby deprive the original grantees of their rights as riparian owners.[2]

The shore-owner of a lake may fill in and dock out in front of his land so long or so far as does not interfere with public rights.[3] Such license when acted upon becomes irrevocable. The Supreme Court of the United States has held that a riparian owner on the Great Lakes, as well as on tide-waters, has by grant, statute, or immemorial usage the right to build out such convenient wharves as do not obstruct the public rights of navigation.[4] On the little lake Muskegan, in the state of Michigan, the Supreme Court of that state has held that the riparian owners have title to the land under the water so far out into the lake as it can be made beneficial for private and personal use, subject to the paramount public rights of navigation and the incidents thereto. The decision seems to have been based on the assumption that neither the Federal Government nor state governments have ever asserted any right to the small lakes within the boundary-lines of that state.[5]

[1] Priewe *v.* Land & Imp. Co. (Wis.), 67 N. W. Rep. 918. *See* Verplank *v.* Hall, 37 Mich. 79. As to the right to draw down the waters of a lake to the damage and injury of riparian owners, *see* Smith *v.* Youmans (Wis.), 70 N. W. Rep. 1115.

[2] Fuller *v.* Shedd (Ill. Sup.), 44 N. E. Rep. 286.

[3] N. J. Z. & I. Co. *v.* Morris C. & B. Co., (N. J.) 15 Atl. Rep. 227.

[4] Dutton *v.* Strong, 1 Black 23.

[5] Rice *v.* Ruddiman, 10 Mich. 125.

* *See* Secs. 81–140, *supra*.

CHAPTER XXIV.

BOUNDARIES OF ISLANDS.

431. Ownership of Islands.—Questions of ownership and boundaries of islands are determined by the same principles of the law as are applicable to the mainland. These principles have been already discussed,* and the different determinations made in regard to the ownership of lands under water in the various states have been pointed out. These varying decisions regarding ownership and boundaries of islands are largely due to the determination of what is a navigable stream, and it will be well to review here briefly the laws regarding navigability, the divergence in which creates the difficulty.

The divergence arises from the inadequacy of the old common-law rule prevailing in England to meet the conditions prevailing here. Thus by common law the ownership of the bed or soil of rivers and waters was made to depend on the navigability or non-navigability of the water covering the land, and what waters should be considered navigable and what should not was in England clearly and certainly established, i.e., that navigable waters are those in which the tide ebbs and flows. This was a convenient and satisfactory rule for England where waters in which the tide did not flow could not be put to any practical commercial use. When the common law was adopted by the various states this holding became a part of the law of this country; but when questions whose solution depended upon this rule came before the courts of this country it was found that the rule was totally inadequate for the conditions prevailing here, where there are numberless rivers and bodies of water which can be put to great commercial use and which are *in fact* navigable but in which there is no tide movement.

It has been shown that the common law recognizes a distinction, as to the property of the soil of rivers or waters navigable and those which are not navigable. The former belong to the public, the latter belong to those whose land borders on the waters; and they have a property in the bed or soil of the river under the water, subject to an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience, and pleasure. This is called in the civil law a servitude, which is quite consistent

* *See* Secs. 371–420, *supra*.

with the right of property. There is an important difference between the common and the civil law in regard to the rights of the public and individuals upon the subject. By the common law the right of the king or the public was limited to those places, whether bays, coves, inlets, arms of the sea, or rivers, in which the tide ebbed and flowed, this being the common-law definition of navigable waters; whereas by the civil law all rivers, provided they are navigable by ships or boats or perhaps any other floating vehicle, were considered public property. The doctrine of the common law is recognized to the fullest extent in some of the United States, that of the civil law in others; and in still others the doctrine of the common law is received, restricted, and modified.

According to the rule everywhere adopted in this country and in England, if an island rises in the sea, it belongs to the sovereign or the public, though by the civil law it belongs to the discoverer or first occupant. If an island be formed in a navigable river, the same rule of the common law gives it to the sovereign, while by the civil law it belongs to the owners of the land on each side.

Should an island, however, arise in an unnavigable river, both the civil and the common law agree in assigning it to the adjoining proprietors. If the middle line of the stream bisects the island equally, each proprietor will take an equal share; but if unequally, then the larger share will belong to him to whose land it is nearest. If the island arise not in the middle but entirely on one side of the stream, then the whole of the island will belong to the owner of the land on that side. This is the general rule upon the subject, and it is usually applied by all the courts of this country because the adjoining landowners own the land under non-navigable waters.[1]

Thus where an island not otherwise lawfully appropriated is so formed under the bed of a river not navigable as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors on the opposite sides of the river according to the original thread of the river.[2] An island in a non-navigable river if all on one side of the dividing-line belongs to him who owns the bank on that side.[3]

In all cases where the title to the soil under the water is in the public, a newly formed island in such body of water belongs to the public, as in the case of the sea, navigable rivers, and the large fresh-water lakes of this country. And in all cases where the soil under the water belongs to the riparian proprietors bordering upon the water, the newly formed island in such body of water will belong to the riparian owner. That is to say, the doctrine which

[1] Hopkins Academy *v.* Dickenson, 9 Cush. (Mass.) 548; Comm. *v.* Alger, 7 Cush. (Mass.) 97; Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268; Pratt *v.* Lamson, 2 Allen (Mass.) 284; Adams *v.* Beese, 2 Conn. 481; Bardwell *v.* Ames, 22 Pick. 333; McCullough *v.* Nall (N. C.), 4 Rich. 68; Butler *v.* G. R. & I. R. Co., 85 Mich. 246.

[2] Deerfield *v.* Arms, 17 Pick. (Mass.) 41; Strange *v.* Spalding (Ky.), 29 S. W. Rep. 137.

[3] Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268.

governs in respect to the soil under the water will control in respect to the island formed in such water. The owner of the soil under the water, by the general laws of property, becomes entitled as of right to all accessions. All authorities are agreed that if an island arises in the sea it belongs to the sovereign or the public, because in all cases the sovereign is the owner of land under tide-water.[1]

The doctrine upon the subject will be understood by a reference to cases. A leading case of Massachusetts (1826) which involved the right to an island in the river Pawtucket recognized the rule of the common law that the property in the soil of rivers not navigable, subject to public easements, belonged to those whose lands bordered upon them; and from this right of property in the soil in the bed of the river the court deduced the right of property in an island which gradually arose above the surface and became valuable for use as land. Taking the thread of the river as it was immediately before such island made its appearance, this rule would give the whole island formed in the bed of the river, if it were wholly on one side of the thread of the river, to the owner on that side; but if it were situated partly on one and partly on the other side of the thread of the river, it should be divided by such line, and held in severalty by the adjacent proprietors. The dividing-line between the adjacent proprietors was run in the same manner as if there were no island in the river.[2]

The same doctrine was approved in 1852, when it was held that if the course of a river not navigable changes and cuts off a point of land on one side, making an island, such island still belongs to the original owner. In such case, if the old bed of the river, being gradually deserted by the current, had filled up and new land was formed, such newly formed land would have belonged to the opposite riparian proprietors, respectively, to the thread of the *old* river. And if new land was formed in the river above said island and not by slow, gradual, and insensible accretion to it, such new land above would belong to the opposite riparian proprietors to the *filum aquæ* or thread of the river. The thread of the river in such case was held to be the median line between the shores or natural water-lines on each side at the time the new land was formed, without regard to the channel or deepest part of the stream.[3] The reader must determine in each case whether or not, under the laws of his state, the river in which the land is situated would be held navigable or non-navigable.* The doctrine which governs in respect to the soil under the water will control in respect to the island formed in such water.

Where a stream or body of water in which an island arises is navigable *in*

[1] Hale De Jure Maris, ch. 4 and 6; Morris *v.* Brook (Del. C. P.), 53 Am. Rep. 215.

[2] Ingraham *v.* Wilkinson, 4 Pick. 268; Deerfield *v.* Arms, 17 Pick. 41.

[3] Adams *v.* Beese, 2 Conn. 481; Bardwell *v.* Ames, 22 Pick. 333; McCullough *v.* Wall (N. C.), 4 Rich. 68; Tyler on Boundaries 74, 75.

* *See* Secs 231–250 *supra*.

fact but there is no tide movement, there is great divergence in the holdings. In some states such an island belongs to the public, but many states give the ownership of the soil under navigable waters to the riparian owner. The whole question depends upon the construction of the word "navigable"; but when the ownership *of the land under the water* is once determined the ownership of the island in such waters is clear. As stated by the United States Supreme Court it is: "If an island or dry land forms upon that part of the bed of the river which is owned in fee by a riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him, with the new deposits therein."[1]

The result of the diverging views is curiously shown in the states of Illinois and Missouri. The courts of Illinois have held that the Mississippi River is not a navigable stream at common law because there is no tide movement in it, and, applying the common-law rule, hold that riparian proprietors own to the middle of the river or of a navigable slough or arm thereof, and that therefore the riparian owner is entitled to any islands formed upon the bed of the stream.[2] But the courts of Missouri hold that the Missouri and Mississippi rivers are *in fact* navigable, and then applying the old common-law rule that the state owns soil under navigable waters, they hold that the private ownership of lands bordering on those rivers stops at the water's edge. Therefore it was held that the owner of contiguous lands is not the owner of an island which springs up in the middle of the stream whether the island be on one side or the other of the thread of the river. He goes only to the margin of the river.[3]

Under this conflict of laws the determination of the ownership of an island in the Mississippi River between the states of Illinois and Missouri would be an interesting problem. It might have two different solutions, depending upon the state in which the suit was brought. This same interesting circumstance might arise on other great rivers such as the Ohio, the Missouri, the Red, or the Wabash River.

One's ownership of mainland on the shore of one of the Great Lakes does not make him owner of an island lying therein 600 feet from the shore.[4] The

[1] St. Louis *v.* Rutz, 138 U. S. 245.

[2] Middleton *v.* Pritchard, 4 Ill. 510; Fuller *v.* Dauphin, 124 Ill. 545 [1888]; Prest. Kaskaski *v.* McClure (Ill.), 47 N. E. Rep. 72; Griffin *v.* Johnson (Ill.), 44 N. E. Rep. 206. *And see* Fletcher *v.* Thunder Bay Co. (Mich.), *citing many cases* [1883]; Gas-lt. Co. *v.* Indus. Wks., 28 Mich. 181; People *v.* Warner (Mich.), 74 N. W. Rep. 705 [1898]; Head *v.* Chesbrough, 13 Ohio Cir. Ct. Rep. 354; 1 Amer. & Eng. Ency. Law 139; 16 Amer. & Eng. Ency. Law 251, 253.

[3] Cooley *v.* Golden, 117 Mo. 33; Benson *v.* Morrow, 61 Mo. 347; Barney *v.* Keokuk, 94 U. S. 324; Naylor *v.* Cox (Mo.), 21 S. W. Rep. 589; Buse *v.* Russell, 86 Mo. 211; Perkins *v.* Adams (Mo.), 33 S. W. Rep. 778, on Missouri River. *And see* Victoria *v.* Schott (Tex.), 29 S. W. Rep. 681; 16 Am. & Eng. Ency. Law 251. *But see* Jones *v.* Soulard, 24 How. (U. S.) 41.

[4] Sherwood *v.* Commissioner (Mich.), 71 N. W. Rep. 532.

limit of ownership is marked by the tide-line.[1] The title of a riparian owner upon Lake Huron does not extend to an island within the lake.[2]

432. Boundaries of Islands.—If land be separated from an island by water, as a slough, at the time of the grant or original survey, and the slough afterward so fills up as to connect the mainland and the island, the question of the dividing-line between the two owners is one depending upon the manner in which the newly made land has been formed. If the soil has been added by accretions slowly and imperceptibly, each, respectively, is entitled to the accretion to his bank or shore, and the dividing-line will be the line of contact where the two banks or water-lines come together.

If the stream or slough gradually fills up as the water recedes, the same principle is applicable, and the new land belongs to the riparian owner from whose shore the water receded; and it was held to be the same whether the stream was navigable or non-navigable. If, however, the slough simply fills up from the bottom, or by deposits within its bed, and is not formed by accretions to the bank, then the center (middle) of the slough between the mainland and the island will be the boundary-line, i.e., the boundary-line will be as it was before the water left it.[3]

Where additions to the shore of an island belonging to a grantee of the government are due to the imperceptible accumulation of soil, they belong to the owner.[4]

Alluvion deposited against an island in a lake and a neighboring lot, so as to connect them, must be equally divided between the owners of both.[5]

Where the mainland on both sides of a stream and an island dividing the stream have been surveyed and sold by the government as separate parcels, the middle line is established in the center of the channels on both sides of the island, between it and the mainland, as though two distinct streams existed.[6]

[1] People *v.* Warner (Mich.), 74 N. W. Rep. 705 [1898].
[2] Sherwood *v.* Commissioners (Mich.), 71 N. W. Rep. 532.
[3] Buse *v.* Russell, 86 Mo. 209.
[4] People *v.* Warner (Mich.), 74 N. W. Rep. 705 [1898].
[5] Bigelow *v.* Hoover (Iowa), 52 N. W. Rep. 124.
[6] West *v.* Fox River Paper Co. (Wis.), 52 N. W. Rep. 803. *See* Croker *v.* Bragg (N. Y.), 10 Wend. 260; Strange *v.* Spalding (Ky.), 29 S. W. Rep. 137.

CHAPTER XXV.

BOUNDARIES ON STREETS AND ROADS.

441. Property in Streets and Ways.—A few remarks may not be out of place as to the nature of the property which an abutting owner has in a street or way. It is generally described as a title in fee-simple, subject to an easement of the public to enjoy the use of the land for all purposes of travel and locomotion. In villages and cities in this country it is often subject by statute to a further servitude of water- and gas-pipes, telegraph and telephone lines, and other conveniences, necessaries, and comforts of city life. These burdens upon streets are sometimes acquired without the aid of the statute, by prescription (twenty years' use in some states), if the burdens are permitted by abutting owners. The right may be so acquired as against the abutting owners of the street, but probably not against the public. Custom cannot authorize such a trespass. If property owners would prevent such prescriptive rights from being acquired in the street in front of their property, they should remove them, or have an injunction issued to restrain their erection, under the claim that they are a permanent trespass or a nuisance.*

In New York state the opinion has been expressed that when land is dedicated for use as a public street it is part of the purpose in view that it shall be used not only for passage, but for all such incidental purposes as may be necessary, appropriate, and usual for the proper enjoyment of such streets, including the building of sewers.[1] In Brooklyn the fee of an old Dutch road, and not a mere easement therein, was in the public under the Dutch law.[2]

The Indiana courts have held that abutting lot-owners, whose title extended to the middle of a highway forty feet in width, could not maintain an action for damages for an unlawful obstruction, eleven feet wide, caused by the construction of a railroad embankment on the opposite side of the road, the only effect of which was to render access to his property more difficult and inconvenient, and to force travel nearer to his lots, no physical invasion of his rights or pecuniary damage being shown.[3]

[1] Matter of City of Yonkers, 117 N. Y. 564 [1889].

[2] Mott *v.* Clayton, 9 App. Div. 181, 41 N. Y. Supp. 87.

[3] Indiana, B. & W. Ry. Co. *v.* Eberle (Ind.), 11 N. E. Rep. 467 [1887].

* *See* Secs. 671–700, *infra.*

A deed in which the description of property is followed by a reservation of a portion of that described to be used for a specific purpose, as an alley, conveys the fee of the part or portion reserved subject only to an easement declared.[1]

In New York, where a deed conveying "all that certain water and vacant land and soil under water" described by metes and bounds, excepted so much as to form part of a street and certain avenues, "for the use and purpose of public streets, avenues, and highways," it was held that the fee to the parts excepted remained in the grantor though they are never used for the purpose mentioned.[2]

When a city has placed the curb on the opposite side of the street so as to leave a space between the curb and the sidewalk for trees of ornamentation on one side, while upon the other side only a place for a sidewalk was left and of less width than provided by the ordinance, the city is not liable in damages for such acts of its officials.[3]

A right of way created by deed to the abutting owner cannot be defeated by later deeds of other abutting portions giving power to alter and rearrange the driveway in a certain event.[4]

442. Rights of Abutting Owners to the Soil of Streets.—Subject to these easements and burdens, the abutting owner has the same general property rights in the street fronting his premises as he has in the lot itself, such rights extending to the middle line of the street. He has the exclusive right to the soil, subject to the right of way of the public.[5] He may not remove it to render the way dangerous or inconvenient. This property is also subject to the reasonable control of the state, county, and village. Villages are incorporated by act of legislature, with power to keep all their streets and alleys in repair and make such ordinances in relation thereto as may be necessary and expedient, and they may make ordinances imposing a penalty upon persons removing soil from their streets. Owners of the fee of the streets have no right to remove or authorize the removal of gravel or dirt, contrary to such an ordinance, without being liable to its penalty.[6] The city cannot appropriate it or authorize the removal of the soil, except what is necessary for the purposes of construction and repair of its streets. The rights of the public in the streets are pre-eminent, and when the improvement of the same requires the taking away of material from one part to repair another part, it has been held that probably the public easement would justify the appropriation of so much material only as the process of construction and repair of the streets

[1] Town *v.* Salentine (Wis.), 66 N. W. Rep. 395.

[2] New York *v.* New York Cent., etc., R. Co. (Sup.), 23 N. Y. Supp. 562.

[3] English *v.* Danville (Ill.), 48 N. E. Rep. 428 [1897], 99 Ill. App. 288.

[4] Boland *v.* St. John's Sc. (Mass.), 39 N. E. Rep. 1035.

[5] Columbus & W. Ry. *v.* Witherow (Ala.), 3 So. Rep. 23 [1888]; Bradley *v.* Pharr (La.), 12 So. Rep. 618.

[6] Palatine *v.* Krueger (Ill.), 12 N. E. Rep. 75 [1887], *reversing* 20 Bradwell 420 [1885].

might require.[1] Acting under its general powers to improve streets, a city cannot make a contract by which the contractor is to receive a part of the stone or soil of the streets as compensation for doing the work of grading. The city is responsible for the appropriation of the soil under such a contract as if the contractors were its agents.[2] The city or public authorities may not carry the excavation of the bed of a road or street below grade for the purpose of using the excavated soil, as gravel, on the surface with the intention of filling up the pit thus made with less valuable earth. Such acts are in violation of the abutter's rights, for which he may maintain an action against the contractor.[3]

If one is owner of the fee in soil over which is a right of way, as an alley, he may erect a building over, or an underground passage beneath, the way, if in so doing he does not interfere with the rights of the public.[4]

If, by act of legislature or by purchase or otherwise, the village or city has title in fee to the soil of its streets, then it may make whatever use of the soil it will, so long as it does not interfere unreasonably with the rights of the public in the street or way.[5]

A city cannot grant a license to an abutting owner to use part of a street as an areaway to his building, or as a ditch to carry away drainage, since such use, being permanent, is inconsistent with the due use of the street by the public.[6]

443. Ownership of Whole Width of Street.—Cases may arise where a grantee may claim the whole of a street. If, as some courts hold, the rule is founded on the presumption that the adjoining owners have originally furnished the land in equal proportions for the sole purpose of a highway, it may yield when the evidence shows that this was not the case. It was held that if a grantor divided his estate into house-lots and streets, one street being laid out upon the margin but wholly upon the grantor's estate, when the street was located the entire street belonged to and passed with the abutting lots under a general description in a deed of the original proprietor.[7]

444. Rights of Abutting Owners in Other Ways than Streets.—The same rules and laws are applicable to public waterways, canals, and railways. In the absence of an express statute, the owner retains the fee-simple title and the exclusive ownership of the soil, subject only to the proper, reasonable, and legitimate use of the land for the purpose of an aqueduct, a canal, or railroad, as the case may be.[8] It has been held that a railway company could

[1] Rich *v.* City of Minneapolis, 37 Alb. Law Jour. 58 [1887].

[2] Rich *v.* City of Minneapolis, 37 Alb. Law Jour. 58 [1887], *and cases cited. And see* Rochester Sav. Assn. *v.* Gorman (Sup.), 47 N. Y. Supp. 81 [1897]; Roberts *v.* Sadler, 104 N. Y. 229 [1887], *and cases cited.*

[3] Roberts *v.* Sadler, *supra.*

[4] Sutton *v.* Groll, 42 N. J. Law 213 [1886].

[5] *See* Wait's Engin. & Arch. Jurisp., § 266.

[6] Smith *v.* McDowell (Ill. Sup.), 35 N. E. Rep. 141; Lewiston *v.* Booth (Idaho), 34 Pac. Rep. 809.

[7] *In re* Robbins, 34 Minn. 79.

[8] Higgins *v.* Reynolds *et al.*, 31 N. Y. 151 [1865].

not appropriate the grass growing upon its right of way.[1] Under the right of a canal company to cross a highway the company does not take the fee to the highway, but simply a right of way.[2] A canal company owning and operating a canal through a stream, as a river, has only a right of way for canal purposes. When the canal company is ousted from its corporate franchise, all such rights revert to the abutting owners.[3] It is liable, however, to be taxed though it does not own the subsoil of dams, sluices, etc.[4]

Casting an additional burden upon land already subject to an easement, as by constructing a telegraph line along the right of way of a railroad company, is as much a taking for a public use as was the taking of it for the original easement, and courts of equity have jurisdiction to prevent it by injunction until compensation is paid or tendered; but where a telegraph line is constructed in good faith in connection with a railroad company over its right of way, and for its use and benefit in the operation of its road, and where it is reasonably necessary for that purpose, such use of the right of way is within the scope of the original easement of the company, and the landowners are not entitled to additional compensation.[5] *

445. Boundary Affected by Changes in Street or Way.—It seems that a boundary upon a street does not change or shift with the street, like that upon a stream, but is confined to its original location. A lot bounded by the sideline or margin of a street was held to be fixed and permanent and not to shift with the change in the line or width of the street. When a street was sixty-three feet in width, but was contracted by twenty feet upon one side of the middle line by the common council upon petition of the landowners fronting upon the street, the court held that the lines of the grant were established in reference to circumstances as they then existed, and could not be changed to conform to any altered condition or circumstance without evidence that such a change was contemplated.[6] Where land conveyed is bounded upon a street the fee of which is in the grantor and the street is subsequently narrowed, leaving a strip between the grantee's land and the new street boundary, the grantee has still an easement and a right of way over said strip to the street.[7] Where the north line of a street running east and west was widened at a certain point and narrowed at another, it in no way changed the south line of the street as shown on the plat under which it was located.[8]

The lines of a street as laid out before the execution of a deed describing

[1] **Bailey** *v.* Sweeney (N. H.), 9 Atl. Rep. 543 [1887].
[2] **Lehigh** Valley R. Co. *v.* Orange Water Co., 42 N. J. Eq. 205 [1886].
[3] **Day** *v.* Railroad Co. (Ohio), 22 Reptr. 533 [1886].
[4] **Flax** Pond W. Co. *v.* Lynn (Mass.), 16 N. E. Rep. 742 [1888].
[5] **American** Tel. & Tel. Co. *v.* Smith (Md.), 18 Atl. Rep. 910.
[6] White's Bank *v.* Nichols, 64 N. Y. 65 [1876]. *See also* O'Brien *v.* King (N. J.), 7 Atl. Rep. 33 [1887]. *But see* Prouty *v.* Tilden, 164 Ill. 163.
[7] White's Bank *v.* Nichols, 64 N. Y. 65.
[8] City of Madison *v.* Mayers (Wis.), 73 N. W. Rep. 43 [1897].

* *See* Secs. 811–840, *infra*.

one of the bounding-lines of the property thereby conveyed as being a specified number of feet from the southerly line of such street are not, for the purpose of determining the location of such lot, changed by the fact that the center line of the pavement subsequently laid on such street does not correspond with its center line as laid out by the city.[1] Building restrictions imposed upon land with reference to the street refer to the street as it existed at the time the restrictions were imposed, and not as subsequently altered by public authority.[2]

Where the owners of land convey the same, bounding it by the line of a highway, parol evidence is admissible to show whether by such description the parties meant the surveyed line of the highway or the line as actually used and occupied.[3] A conveyance of land bounded by a road should be construed as referring to the actual road as worked and used, and not to an abstract legal line, invisible and practically unknown.[4]

When an act of the legislature directs the extension of a city to a boundary to be determined by extension of a street, the street must be extended in its orginal direction.[5]

446. Presumption of Law that Abutting Owners Hold Title to Street. —All American and English courts recognize the existence of a rule of presumption that a conveyance of land bounded on a highway passes to the grantee a title to the center of the way. The difference in the opinions arises from the application of the rule. The rule is founded upon a policy which tends to guard against inconveniences of the most alarming character, and it ought not to be frittered away by distinctions founded on differences in phraseology which might readily escape attention. Primarily the question hinges upon the intention of the parties, which is paramount. If the intention be disclosed by a careful consideration of the conveyance, it will prevail. The intention expressed must be so clear as to overcome and refute the legal presumption that the conveyance was to include one-half of the highway.

The determination of the boundary depends, therefore, upon the reasonable construction of language (that may or may not show the real intention of the parties) on the one hand, and upon public policy on the other. Chancellor Kent treated it as a rule of public policy merely.[6] Little can be said about the construction of language, but it is submitted (1) that the ordinary layman or country surveyor, whose deeds and descriptions bring up these questions, has little regard for technicalities of language (2) that it is not the actual practice of surveyors in general to measure to the center of a street or stream in making a survey, but to confine their operations, and therefore their descriptions, to the land inclosed, exclusive of street or stream; (3) that it is

[1] Hastings *v.* McDonough (App. Div.), 43 N. Y. Supp. 628.
[2] Tobey *v.* Moore, 130 Mass. 448 [1881].
[3] Wead *v.* St. Johnsbury & L. C. R. Co. Vt.), 24 Atl. Rep. 361.
[4] Blackman *v.* Riley (N. Y. App.), 34 N. E. Rep. 214.
[5] City of Monroe *v.* Police Jury (La.), 17 So. Rep. 498.
[6] 3 Kent 433.

an acknowledged popular belief that the public are owners of the soil of a highway. These three facts should make the language of a description, in such circumstances, extremely uncertain; and it would seem, if there are good sound reasons of public policy why abutting owners should own to the center of the street (or stream) that these reasons should prevail unless the contrary intention appear in clear and explicit terms.

The chief objects of holding that abutting owners shall own to the center of the street or stream are the following: (1) To prevent the existence of innumerable strips and gores of land along the margin of streams and highways, the title to which may remain in abeyance for generations, after which, upon the happening of some unexpected event and one consequently not in express terms provided for in the title-deeds, a bootless, almost objectless litigation may spring up to vex and harass those who in good faith supposed themselves secure from such embarrassment.[1] (2) The abutting owner pays the taxes and is assessed for the improvements of these streets, such as paving, curbing, and sewers, and it were an injustice that another should reap the benefit of such expenditures. (3) The abutting owner is held responsible for the condition of the street, such as the clearing the walks of snow and of other obstructions. (4) Ordinances, statutes, and courts universally hold the abutting owner responsible for all burdens and improvements to his half of the street, which is a good and sound reason why he should be given proprietary interests therein.[2]

This line of argument was employed by Chief Justice Lewis of the Pennsylvania court, who maintained that the general understanding of the people, the extensive and immemorial practice of claiming and acquiescing in such rights, ought to have great weight, if there were no other reason in support of this rule. A contrary rule would introduce a flood of unprofitable litigation. The rule had its origin in regard to the nature of the grant. Where land was laid out in town lots with streets and alleys, the owner received a full consideration for all such streets and alleys in the increased value of the land. The object of the purchasers of the lots was to enjoy the usual benefits of the streets, that houses might be erected fronting on the same, with windows, and doors and door-steps for passage in and out, and for the proper enjoyment thereof. If the street belong to another, there would be danger of suits for trespass for each and every act of the abutting owner inconsistent with the rights of the proprietor of the street.

Other equally practical reasons for the rule exist. Throughout the history of property, one of the prime objects of the English common law and of English and American legislation has been to make secure rights in real property, to render them absolute, and to quiet adverse claims, that the owner

[1] *Redfield's dissenting opinion in* Buck *v.* Squires, 22 Vt. 484.

[2] Hughes *v.* Prov. & W. R. Co., 2 R. I. 508; G. R. & I. R. Co. *v.* Heisel, 38 Mich. 62; Hamlin *v.* Pairpoint, 141 Mass. 51; Kings Co. F. I. Co. *v.* Stevens, 87 N. Y. 287.

might enjoy in peaceful security the comforts of a landed estate. The law of prescription, the statutes of frauds and of limitations, have all had this common end in view, and it would be strange if we did not find the same efforts to establish permanency and security in the laws of boundaries. To effect this same object, the law of boundaries is so established as to avoid such old and adverse claims. The law is so construed as to avoid miscellaneous parcels, gores, and pieces the ownership of which is not likely to be asserted or the land itself occupied.

447. Boundary "On," "By," "Along," "Upon" a Public Way.—It is an established inference of law that a conveyance of land bounded on a highway or river carries the fee to the center of the highway or river, provided the grantor at the time owned to the center *and there be no words or specific description to show a contrary intent*,[1] or unless it clearly appears that it was intended to make the side-line of the street a boundary, instead of the center.[2]

When a street is called for it is regarded as a single line. The thread of the road is the monument of abuttal.[3] If the land be bounded upon a street, river, or other monument having width, courts incline strongly to such an interpretation of the language as will carry the fee of the land to the center line of such monument, rather than to its edge only.[4]

Generally when land is described by a road or highway as a boundary the presumption is that the line is the middle of the way. The strength of this presumption varies in different states, and in some is modified by the terms or language employed.[5]

Land bounded "on the north by the dugway at the north end of a horse-shed," where the dugway referred to was thirty-one feet long and five and one-half feet wide at the bottom, and apparently been cut by surface-water, but had for many years been used as a footpath and occasionally by horses and wagons, it was held that the dugway was a lane or alley, and that the deed conveyed title to the middle thereof.[6] The tendency of the courts of the Southern and Western states seems to be toward the New York and Massachusetts rule of construction.

In New Jersey the grantee was held to own to the center of an avenue dedicated to the public, where the plat designated thirty-three feet of the center of the one hundred feet in width for railroad purposes.[7] And in

[1] People *v.* Bd. of Supervisors, 125 Ill. 9 [1888]; Morrow *v.* Willard, 30 Vt. 118 [1857]; Warren *v.* Thomaston (Me.), [1883]; Salter *v.* Jonas, 10 Vroom 469; Paul *v.* Carver, 26 Pa. St. 223; Columbus & W. Ry. *v.* Witherow (Ala.), 3 So. Rep. 23 [1888].

[2] Moody *v.* Palmer, 50 Cal. 31 [1875]; Johnson *v.* Anderson, 18 Me. 76; Paul *v.* Carver, 26 Pa. 223; Newhall *v.* Ireson, 8 Cush. 598; Buck *v.* Squires, 22 Vt. 493.

[3] Newhall *v.* Ireson, 8 Cush. 595.

[4] Paine *v.* Consumers' Co. (C. C. A.), 71 Fed. Rep. 626.

[5] In Massachusetts the rule is well settled. Smith *v.* Slocum (Mass.), 9 Gray 36; Peck *v.* Denniston, 121 Mass. 17; White *v.* Godfrey, 97 Mass. 472; Dean *v.* Lowell, 135 Mass. 55; Chadwick *v.* Davis, 143 Mass. 7; O'Connell *v.* Bryant, 121 Mass. 557; Morgan *v.* Moore, 3 Gray 319; Sibley *v.* Holden (Mass.), 10 Pick. 249.

[6] Pitney *v.* Heusted (Sup.), 40 N. Y. Supp. 407.

[7] Penna. R. Co. *v.* Ayres (N. J.), 14 Atl. Rep. 901 [1888].

Pennsylvania a grantee in a deed naming a specified street as an adjoinder on one side takes the conveyance subject to a right of way on the so-called street previously granted by his grantor and subject to a prior appropriation of a specified width of such street for the building of a lateral railroad.[1]

448. Middle Line of Street the Boundary.—The conveyance goes to the center of way[2] if described as *on*, *along*, or *by said street*, or *by said road*,[3] or *lying on a street*,[4] or *along the street*,[5] and when city lots abutting on a street are conveyed by numbers.[6] The same rule holds when land has been granted by the state and the description calls for a public road as a boundary.[7]

449. Rule is Well Established in Some States that Center Line of Street is Boundary.—In Pennsylvania the law is distinctly settled that where a street or a non-navigable stream is called for in a deed as a boundary or monument, the fee passes to the center of it in the absence of an express exception in the grant, or some clear and unequivocal declaration, or some certain and immemorial usage to limit the title of the grantee in such cases to the edge or side. Ordinary every-day language of a deed will not be construed so as to alter the rule, thus producing a result so inconvenient and contrary to the practice of the people.

In some states this presumption is so strong that only the most clear and explicit terms will avail to prevent the adjoining owner from acquiring title to the middle of the way. In Connecticut it was held that if the land conveyed bounded on a highway it made no difference in the legal construction of the conveyance whether the words *upon*, *by*, or *along* the highway were used or not; the effect is the same to pass title to the middle of the way.[8]

A call for a particular *side* of a street, and a measurement of a distance set forth in a conveyance,[9] which brings the line only *to the side* of the street,[10] or if both together are set forth,[11] or if the deed says nothing about a highway, and the south line of the land does not correspond with the north line of the highway as originally laid out,[12] or if the land be described as "beginning on the westerly side of a road, thence northerly, touching the said westerly

[1] Nalley *v.* Pennsylvania R. Co., 177 Pa. 117, 35 Atl. Rep. 638.

[2] White *v.* Godfrey, 97 Mass. 472; Cottle *v.* Young, 59 Me. 105; Low *v.* Tibbetts, 72 Me. 92; Peck *v.* Denniston, 121 Mass. 17; Dean *v.* Lowell, 135 Mass. 55.

[3] Edsall *v.* Howell (Sup.), 33 N. Y. Supp. 892; *Re* Cathedral Parkway (N. Y.), 20 App. Div. 404, 46 N. Y. Supp. 832; Gorham *v.* Eastchester El. Co. (Sup.), 30 N. Y. Supp. 125; Dean *v.* Lowell, 135 Mass. 55 [1883]; Firmstone *v.* Sparter (Pa. Sup.), 25 Atl. Rep. 41; Carpenter *v.* Buckman (Ky.), 41 S. W. Rep. 579; Foreman *v.* Presbyterian Ass'n (Md.), 30 Atl. Rep. 1114. *And see* Church *v.* Stiles (Vt.), 10 Atl. Rep. 674 [1887]; Mott *v.* Mott, 68 N. Y. 246 [1877], *and cases cited.*

[4] Tinker *v.* Metropolitan El. R. Co. (Sup.), 30 N. Y. Supp. 1014.

[5] Hammond *v.* McLachlan, 1 Sandf. (N. Y.) 323; Hennig *v.* Fisher, 1 Sandf. (N. Y.), 344.

[6] McCruden *v.* Rochester Ry. Co. (Cir. Ct.), 25 N. Y. Supp. 114.

[7] Cosgrove *v.* Kingston C. Co. (Pa.), 40 Atl. Rep. 151 [1898]; Cheney *v.* New York, etc., R. Co. (App. Div.), 40 N. Y. Supp. 1103.

[8] Champlin *v.* Pendleton, 13 Conn. 23; Hennessy *v.* Murdock (N. Y. App.), 33 N. E. Rep. 330; Mangam *v.* Sing Sing, 11 App. Div. 212, 42 N. Y. Supp. 950.

[9] Paul *v.* Carver, 26 Pa. St. 223.

[10] Newhall *v.* Iveson (Mass.), 8 Cush. 595.

[11] Cox *v.* Friedley, 33 Pa. St. 124.

[12] Champlin *v.* Pendleton, 13 Conn. 23.

side of said road,"[1] such calls will be insufficient to control (change) the rule of law which extends the title of abutting owners to the center of the road, in the respective states where cases are cited.[2]

In Pennsylvania, however, when the deed named "the side of a street" and gave the distances to minute fractional parts, and there were stakes or monuments standing or placed upon the side at distances corresponding to those given in the description, it was held that these did not show paramount intention of the parties sufficient to reserve the highway.[3] The court remarked that monuments could not be in the street any more than marked trees or stakes could have stood in the middle of a stream. They would naturally be found upon the margin, and it is the universal custom to so place them.[4]

The fact that the description in the deed, after stating the number of the lot, gives its dimensions, exclusive of the highways, does not affect such construction.[5]

The owner of land on a highway in the country is presumed to own the fee to the middle of the highway. A description "beginning at the corner" of a neighbor's land on the north side of a highway, thence running "along" the highway, thence, after several courses, to the place of beginning, conveys the fee to the middle of the highway.[6] The same doctrine is maintained in Colorado, where the words *to a street* or *to the side of the street* and *along the street*, carry the grantee to the middle; and the same holds if the description calls for the corner of two intersecting streets as the starting-point.[7]

Where general terms of description are used in a deed, like "to," "upon," or "along" a highway or railroad, and where there is a conflict between courses and distances on the one hand and monuments mentioned in the deed on the other, the description by monuments must control.[8]

If a grantee takes title to the center of a street bounding his conveyance, the question arises whether as a purchaser by the square foot he must pay for the land included in the highway. It has been held, in the absence of any special agreement to that effect, that he need not in the city of Washington, D. C.[9]*

[1] Johnson *v.* Anderson, 18 Me. 76.

[2] *Accord*, Woodman *v.* Spenser, 54 N. H. 507; Kneeland *v.* Van Valkenburg, 46 Wis. 434.

[3] Cox *v.* Friedley, 33 Pa. 124; Oxton *v.* Graves, 68 Me. 371.

[4] *See also* Salter *v.* Jones, 39 N. J. Law 469.

[5] Brown *v.* City of Baraboo (Wis.), 74 N. W. Rep. 223 [1898]; *Re* Cathedral Parkway (N. Y.), 20 App. Div. 404; Grant *v.* Moon (Mo. Sup.), 30 S. W. Rep. 328; Moody *v.* Palmer, 50 Cal. 31 [1875]; Boland *v.* St. John's School (Mass.), 39 N. W. Rep. 1035; Hannibal Mtge. Co. *v.* Shaubacher, 57 Mo. 582 [1874]. *See* Wead *v.* St. Johnsbury Co. (Vt.), 24 Atl. Rep. 361.

[6] Holloway *v.* Delano (Sup.), 18 N. Y. Supp. 700, *reversing* 16 N. Y. Supp. 543.

[7] Moody *v.* Palmer, 50 Cal. 31 [1875]. *But see, contra*, Alameda Macadamizing Co. *v.* Williams (Cal.), 12 Pac. Rep. 530 [1887].

[8] Church *v.* Stiles (Vt.), 10 Atl. Rep. 647 [1887].

[9] Brent *v.* Smith, 5 Cranch C. C. 672 [1840]. *See* Wharf Co. *v.* Portland, 46 Me. 42 [1858].

* *See* Sec. 411, *supra*.

450. The Intention of the Parties must Prevail.—In all cases the boundary depends upon the construction of the language used by the parties and upon such surrounding circumstances as are proper to be taken into account to ascertain the *intention* of the parties, keeping always in view the legal presumption that the parties intended to include the highway, and that the burden is upon the party who assumes to show that the parties intended to the contrary.

The rule that the middle of the way is presumed to be the boundary is not absolute, irrespective of manifest intention. Other facts and considerations indicating a different intention may be considered, such as the giving of measurements which exclude the way, a statement that the parcel described is a part of a larger tract, which does not include any part of it, or the fact that the parties acted on a different construction.[1] The presumption may be rebutted.[2]

In New York the presumption is not so strong and the decisions do not go to the extent of those of Pennsylvania and Connecticut, but limit the title to the manifest intention of the deed, as can be gathered from the terms employed, and from the circumstances and conditions of the lands and parties.[3]

451. Intention Expressed by Different Phrases and Clauses—Side or Line of Street.—A description which stated that a boundary commences at the intersection of the side-lines of two streets, and thence by several courses along the side-lines of the same streets to the place of beginning, was held necessarily to exclude the street.[4]

A description of land as bounded by a line running "on the easterly side of a highway" certainly does not import "the center line of the highway" so that the easterly side was construed to mean the eastern edge or line of the highway. This construction is in keeping with that adopted in Massachusetts, New Hampshire, Vermont, and New York. In Vermont this rule was adopted after a thorough review of the authorities; and, like the case which decided the law in New York that land bounded by a shore excluded the water, it was not decided without strong dissenting opinion.[5]

When the boundaries of a field start at the side of the road and come back to the road, and thence on the line of the road to the beginning, the conclusion is that the road is excluded.[6] The designation in a deed of the place of

[1] Crocker *v.* Cotting (Mass.), 44 N. E. Rep. 214.

[2] *Re* Rochester (App. Div.), 40 N. Y. Supp. 1007.

[3] Mott *v.* Mott, 68 N. Y. 246 [1877].

[4] English *v.* Brennan, 60 N. Y. 609; White's Bank *v.* Nichols, 64 N. Y. 65.

[5] Buck *v.* Squires, 22 Vt. 484, *and cases cited.*

[6] Chief Justice Shaw *in* Smith *v.* Slocum (Mass.), 9 Gray 36; Sibley *v.* Halden (Mass.), 10 Pick 249. *Accord*, English *v.* Brennan, 60 N. Y. 609; White's Bank *v.* Nichols, 64 N. Y. 65; People *v.* Bd. of Supervisors, 125 Ill. 9 [1888]. *And see* Foley *v.* McCarthy (Mass.), 32 N. E. Rep. 669; Hobson *v.* Philadelphia (Pa.), 24 Atl. Rep. 1048; Mott *v.* Clayton (N. Y.), 9 App. Div. 181; Blackman *v.* Riley (N. Y. App.), 34 N. E. Rep. 214; Holloway *v.* Delano (N. Y. App.), 34 N. E. Rep. 1052; Hunt *v.* Brown (Md.), 23 Atl. Rep. 1029; Pea-

beginning as "on the north side of W. street, beginning, for outbounds, east 160 feet from L. street, extended to the east corner of lot . . . owned by B., and running with W. street," is unambiguous and cannot be varied or explained by testimony as to understanding of the parties.[1] If premises are bounded by the line of the street, the title extends only to that line.[2] When the description was, "beginning at a monument on the south *side* of the road, thence by various courses to said road, thence by said road to the place of beginning," it was construed to limit the boundary to the south side of the road. "To the road" would ordinarily mean to the middle of the road, and if the line were run from this middle point to the place of beginning, it would neither be by the side of the road nor in the middle, but by a diagonal line from a point in the center to a point in the side; and this would be inconsistent with any supposed intent of the parties.[3]

A description of a lot on the east side of a public highway as "beginning at the northwest corner of lot No. 4 opposite the southeast corner of lot No. 1 on the east side of a highway, running thence . . . along the road," was held to carry the title to the center of the road, especially when the grantor in the same deed has conveyed lot No. 1 on the west side of the western half of the road.[4]

The words "to and along the road," if not controlled by the starting-point, would, by well-settled construction, carry the boundary to the center, but these words are also consistent with confining the boundary to the side of the road. The words "beginning at the side of a road" would not be consistent with a line through the middle of the road.[5]

452. Intersection of Streets or Roads.—A deed by metes and bounds, beginning at "a post planted" at intersection of W. and S. streets, thence northwesterly 500 feet, etc., thence to a "post planted on the line of W. street," conveys no part of the street.[6]

When a deed described premises as "beginning at the intersection of the exterior lines of two streets," the point thus established was held to control the other parts of the description. Lines running along the streets are held confined to the exterior lines of the streets, and the soil of the street is not included in the grant.[7] It seems that the corner of two intersecting streets may be in the middle of such streets.[8]

body Hts. Co. *v.* Sadtler, 63 Md. 533. *But see* Holloway *v.* Southmayd (Sup.), 18 N. Y. Supp. 707.

[1] Neal *v.* Hopkins (Md.), 39 Atl. Rep. 322 [1898].

[2] Wharf Compy. *v.* Portland, 46 Me. 42 [1858].

[3] Sibley *v.* Holden (Mass.), 10 Pick. 249. *See also* Low *v.* Tibbetts, 72 Me. 92; Peck *v.* Denniston, 121 Mass. 17; Peabody Hts. Co. *v.* Sadtler, 63 Md. 533; Rieman *v.* Baltimore, etc., Co. (Md.), 31 Atl. Rep. 444.

[4] *Re* Cathedral Parkway (N. Y.), 20 App. Div. 404.

[5] Kings Co. Fire Ins. Co. *v.* Stevens, 87 N. Y. 287; Blackman *v.* Riley (N. Y. App.), 34 N. E. Rep. 214.

[6] Neal *v.* Hopkins (Md.), 39 Atl. Rep. 322.

[7] White's Bank *v.* Nichols, 64 N. Y. 65 [1876].

[8] Holloway *v.* Delano (Sup.), 18 N. Y. Supp. 700; Holloway *v.* Southmayd (Sup. Ct.), 18 N. Y. Supp. 707.

453. Boundaries on Private or Unaccepted Streets.—The rules laid down, however, have been held not to apply to intended streets, nor to land intended to be dedicated as a highway, but only to existing or established roads. This rule seems to be applied in England,[1] and in Maine to parks;[2] and where an estate has been mapped and house-lots and streets designated upon the map, and the land was bounded "southerly on Center Street, there measuring 120 feet," referring to a map, Center Street having been prepared and used as a street or way.[3] The same law is applied in New York and Massachusetts to private streets.[4] In some cases private streets are held to belong to abutting owners.[5] Private streets do not belong to abutting owners in Maryland.[6] If plat is made and recorded, they do in Illinois.[7]

454. Boundaries on Ways when Land is Described by Reference to a Plat.—If land upon a highway is conveyed by a plan on which the tract is colored, excepting the way, and its dimensions ascertained by measurement, the presumption of law is that the soil of the highway to the center of the way passes unless there is evidence upon the face of the conveyance to show that a moiety of the highway was not intended to pass.[8] The presumption is universal, in the absence of express evidence, that the adjoining owners have contributed to the formation of the road, and have dedicated it for the public benefit; it is reasonable, therefore, that when a man has granted all his land or all his fields, he should be held also to have granted the soil of such roads as may form the boundary of his property up to the middle line thereof.[9] A reference to a plan annexed, the measuring and coloring of which would exclude the street, or a description by lines and measurements which would only bring the premises to the exterior line of the highway, will not exclude it nor rebut the presumption.[10] It seems, therefore, that the intention of such a dedication will not be presumed, but must be expressed or shown by some evidence, as a plan or some act of the dedicator. Such cases present a very strong plea for care in surveying and laying out land, when the placing of a word upon a map may forfeit a man's title to his property. It illustrates the evils of garnishing maps, and planning public features, without authority from the proprietor. A map of an estate or town-site should be carefully reviewed and explained by a competent authority before it is published and distributed by

[1] Leigh *v.* Jack, 3 Ex. Div. 264.
[2] Bangor House *v.* Brown, 33 Me. 309.
[3] *Accord*, The U. B. Ground *v.* Robinson, 5 Wharton 18.
[4] *Semble*, Bissell *v.* N. Y. Cent. R. Co., 23 N. Y. 61; Fisher *v.* Smith, 9 Gray 441; Stark *v.* Coffin, 105 Mass. 328; Motley *v.* Sargent, 119 Mass. 231; Gould *v.* Eastern R. Co., 142 Mass. 85. *But see* Mott *v.* Mott, 68 N. Y. 246.
[5] Philadelphia *v.* Scott, 81 Pa. St. 85. *But compare* English *v.* Brennan, 60 N. Y. 609.
[6] B. & O. R. Co. *v.* Gould (Md.), 8 Atl. Rep. 754 [1887].
[7] (Ill.) 15 N. E. Rep. 854 [1888].
[8] Berridges *v.* Ward (Eng.), 10 C. B. (N. S.) 400 [1861]; *Re* Cathedral Parkway (N. Y.), 20 App. Div. 404. *See also* Sutherland *v.* Jackson, 32 Me. 80; Gould *v.* Eastern R. Co., 142 Mass. 85; Hansom *v.* Campbell, 20 Md. 223; Boston *v.* Richardson, 13 Allen 146.
[9] Leigh *v.* Jack (Eng.), 3 Ex. Div. 264.
[10] *Semble*, Hennessy *v.* Murdock (N. Y. App.), 33 N. E. Rep. 330.

the proprietor, for it involves the consideration of many nice questions of law and engineering.*

455. Reservation of Narrow Strip of Land as Boundary of a Village.—In laying out an estate for a town it is sometimes the practice to reserve to the original owner, or to the promoters, the exclusive ownership and control of a narrow strip of land (say two feet in width) circumscribing and surrounding the entire village-site. This is done to prevent outlying landowners from opening streets and avenues and dividing up their lands into lots, the sale of which would cheapen those in the village laid out. With such a strip surrounding the village, any attempt to enter the village from without will be a trespass, and any attempt to connect with the streets, avenues, gas-, water-, or steam-pipes, or to profit by the improvements afforded by the village, is effectually blocked. The promoters of the village may build a wall across any way opened, or about the entire village-site, or they may prevent any outsiders from entering an action of trespass. The width of the strip is immaterial so far as the rights of the parties are defined.

The one-vigintillionth part off the front end of a lot may be so minute as to be unappreciable by the physical senses, yet nevertheless the mind recognizes it as a real entity; and a title obtained to it by a deed under a tax sale would cut the owner off from access to the street, and render him guilty of a technical trespass whenever he passed over it.[1] Yet the courts of the same state have held that a deed which describes so infinitesimal a portion of land that it cannot be identified is void.[2]

The New York courts have held that an encroachment of one-fourth of an inch upon an adjacent lot did not warrant a denial to the vendor of a specific performance of a contract to purchase by the vendee.[3]

A strip two feet wide along the side of lots next to the street, which the plat provides is reserved for location of fence, to be perpetually held as private property of the owners of the several lots in the plat collectively, cannot be separately sold for street assessment, but the owner of each lot owns the fee of it, subject to an easement in favor of the other lot-owners, as he owns the fee to the middle of the street, subject to the easement of the public.[4]

456. Reverting of Abandoned Streets to Abutting Owners.—When land is sold described as extending "to the center of the street" and the street is subsequently abandoned and damages paid to the grantee to compensate him for closing the street, he may not lay claim to any land of the street further than to the center. The land of the street opposite to him will revert to the original grantor.[5]

[1] Connecticut Mut. Life Ins. Co. *v.* Stinson, 62 Ill. App. 319.
[2] Gloss *v.* Furman, 164 Ill. 585, 45 N. E. Rep. 1019, *affirming* 66 Ill. App. 127.
[3] Katz *v.* Kaiser, 10 App. Div. 137.
[4] Town of Woodruff Place *v.* Raschig (Ind. Sup.), 46 N. E. Rep. 990.
[5] Baltimore & Ohio R. Co. *v.* Gould (Md.), 8 Atl. Rep. 754 [1887].

* *See* Secs. 701–710, *infra*.

By statute in Michigan it is provided that when a street or alley is vacated the same shall be attached to the lots bordering thereon, and the title thereto shall vest in the person owning the property on each side to the center of such a street or alley. Under this law, in a case where an alley had been dedicated to the public by a plat reserving to the dedicator, his heirs or assigns the reversionary interest, it was held that the fee belonged to the abutting owners.[1]

[1] Scudder *v.* Detroit (Mich.), 75 N. W. Rep. 286 [1898].

CHAPTER XXVI.

BOUNDARIES DETERMINED BY ARBITRATION.

461. Arbitration a Popular Means of Settling Boundary Disputes.—In the treatment of the subject of arbitration it is intended to give only so much of the law as will enable a surveyor to intelligently advise his patron as to his boundaries when called upon to determine them, and to enable him to establish them as they should be located, in view of all the facts and circumstances.

Arbitration is the most frequent and satisfactory method of deciding the location of disputed boundary-lines. The fees and services of lawyers, the fees of clerks, issuing of writs, the thousand and one delays, vexations, and annoyances of court machinery, are avoided and the question quickly and intelligently decided. A determination of the boundary-line of an estate by one intelligent, disinterested, and conscientious surveyor, or by three such surveyors, is much more likely to be true and equitable than a determination by twelve jurymen of average intelligence, who know little more about a problem of surveying, and about surveyors' methods in such a problem, than they do about a case of leprosy or its treatment by the medical profession. Intelligent landowners might as well call on a jury to attend them and prescribe for them when they have a fever as to call on them to solve a difficult problem in engineering, and they would get equally as good treatment in one case as in the other. If a man knows he is in the wrong and that he is not justly entitled to what he claims, then one of the best evidences of it, to a surveyor, is his eagerness to take his claim into a court of law. He may have a hopeless case, if in the hands of an intelligent surveyor, and yet recover through an ignorant jury.

What has been said applies generally to the arbitration of most questions in engineering, and the reader is referred to Wait's Engineering and Architectural Jurisprudence in regard to the subject.[1]

462. Submission of Disputes in Regard to Real Estate.—There is a popular notion that matters with regard to real estate cannot be submitted to arbitration, but this is not so, and there seems to be no good reason why such

[1] Wait's Engin. and Arch. Jurisp., Chapter XIX, §§ 519–533. *And see* Cooley's Judicial Functions of Surveyors; Johnson's Theory and Practice of Surveying, Appendix A.

disputes may not be arbitrated. If the award affects the title to the land or real estate, then the submission must be under seal on the principle that the authority to do an act should be of as high an order as the act itself.[1] The award, although conclusive between the parties, cannot pass title. It merely prevents the losing party from denying the superiority of the title of the other party. If arbitrators wish that the property be conveyed, they should specially order the parties to execute and deliver a deed of conveyance. An award fixing the boundary-line will be a good defense to an action of trespass, and it will support an action of ejectment.[2] An award that the dividing-line shall be five feet from the fence and shall cut off A's land to be added to B's land, the expression simply describing the land as established and not showing an unwarranted taking of land, is not in excess of a general authority to establish the true boundary-line between the litigants.[3]

When a statute provides that a controversy concerning the boundaries of land, but not the claim of any person to the estate in fee, may be submitted to arbitration, a dispute as to the ownership of a strip of land which is claimed by the adjoining owner, and which is expressly conveyed to him in fee by his deed, cannot be determined by arbitration.[4]

463. Effect of a Submission to Arbitration.—The submission amounts simply to an agreement to await the award. In a bond conditioned "to abide by and perform an award" the words "abide by" do not mean to acquiesce in, but simply to await the award without revoking the submission. It has been held, therefore, that entering on disputed land and erecting a fence several rods from the line found and fixed by arbitrators, to whom the dispute had been referred, was not a breach of the arbitration bond.

No action can be maintained on the agreement "to abide by and perform the award." Such an act before the award is made would be a breach of the submission, and would give an action on the bond; but the award having been made in pursuance of the submission, the parties are left to the ordinary remedies at law to settle subsequent controversies, and they afford ample redress.

The digging up and removing of stone monuments erected by a surveyor as an arbitrator to designate the division-line found and established by his award, by one party, and his denying that to be the true line, is likewise held not to be a breach of his arbitration bond. He is liable for trespass and damages consequent to it.[5]

464. Determination by Arbitrators is Final.—A disputed boundary may be conclusively determined by a third person as an arbitrator or an umpire on behalf and by agreement of the adjoining owners. This third party or arbitrator is usually a civil engineer or surveyor, or an odd number of persons who

[1] 1 Amer. & Eng. Ency. Law 655.
[2] 1 Amer. & Eng. Ency. Law 714.
[3] Pearson *v.* Barringer (N. C.), 13 S. E. Rep. 942.
[4] Lang *v.* Salliotte (Mich.), 44 N. W. Rep. 938.
[5] Weeks *v.* Trask (Me.), 16 Atl. Rep. 413 [1889]; Marshall *v.* Reed, 48 N. H. 36.

are especially qualified to determine the location of the line, and in whose honesty and qualifications the parties have confidence.

When adjoining owners have mutually agreed to submit to and abide by the decision of a third person in regard to boundaries in dispute between them, and the question has been decided and an award made, the decision is conclusive upon both parties and cannot afterwards be questioned or disputed. A valid award has the same effect as a judgment and effectually precludes the parties to the controversy from ever litigating the matters anew.[1]

Surveys are to no purpose in deciding the division-lines, after such a submission and award, except with a view to ascertaining or staking out the lines determined and fixed by the parties to whom the question was referred. Such agreements with regard to boundaries need not be under seal nor in writing; they may be simple parol agreements; and in the absence of any provisions to the contrary the award may be by parol,[2] or by the act of the arbitrator, who may himself fix the line according to his award.[3] The fact that the submission is in writing or even under seal does not require that the award be under seal or in writing.[4] Nor is it necessary that it be attested by witnesses.

If, however, the submission contains instructions in regard to the form of the award, the instructions must be strictly followed unless waived by the parties; and a mere intimation that a written award is required will suffice to render it necessary.[4]

465. What Constitutes a Submission.—Any form of words will be sufficient at common law to constitute a submission to arbitrators, if it expresses the intention to submit to and abide by their decision and award. It has even been held that the intention need not be expressed in words, but the submission may be implied by law from their acts or the circumstances attending the submission.[5] In some states statute laws have been passed requiring certain ceremonies in case of submission to arbitration. The submission must be mutual and definite in its terms and be made by all the parties to the dispute. It should be certain as to the subject-matter or boundary-line that is to be determined. If the submission is uncertain, the award may be set aside.[6]

466. Arbitrators Should be Named.—The parties to whom the controversy is referred must be definitely ascertained and agreed upon both as to number and name, or at least as to how they are to be selected and ascertained. Where an agreement was made to refer the matter in dispute "to two disinterested men, together with a surveyor, with privilege to call in a third party," it was held that the reference was to two arbitrators only, with liberty to call in another, and the surveyor was designated to aid and not to act as one of them.[7]

[1] 1 Amer. & Eng. Ency. Law 711.
[2] 1 Amer. & Eng. Ency. Law 692, *and cases cited.*
[3] Jones *v.* Dewey, 17 N. H. 596.
[4] 1 Amer. & Eng. Ency. Law 692.
[5] 1 Amer. & Eng. Ency. Law 656; Whitcher *v.* Whitcher, 49 N. H. 176; Stewart *v.* Cass, 16 Vt. 663; Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430; Wilson *v.* Getty, 57 Pa. St. 266; Evans *v.* McKinsey, 6 Litt. (Ky.) 262.
[6] Woodward *v.* Atwater, 3 Iowa 61.
[7] Crawford *v.* Orr, 84 N. C. 246.

Any one may be an arbitrator, for every person is at liberty to chose whom he likes best for his judge, but he cannot afterwards object to the manifest deficiencies of his choice.[1] The only thing that disqualifies a person from acting in the capacity of an arbitrator is a secret interest in the question to be decided. If the interest is known to both parties to the dispute and they do not object, they will be considered to have waived their objection and the award will be binding upon the parties. Family relationship between parties and any pecuniary or property interest of the arbitrator in the dispute or award, the reception of favors or gifts by the arbitrator which may have the effect of inducing him to act unfairly, if not known to the other party, may disqualify him, or be sufficient cause for the court to set aside his award.

The fact, however, that the arbitrator has been counsel in another action for either party, or that one of the parties is indebted to the arbitrator for a small amount the receipt of which does not depend on the award, or that the arbitrator is a debtor to one of the parties, is not sufficient ground for disqualification or to give a court jurisdiction.[2]

467. Award is Irrevocable and Binding.—It is only after the question submitted has been acted upon and the award has been made that the submission becomes irrevocable. One adjoining owner may regret his act, or learn something to shake his confidence in the arbitrator, and wish to rescind his agreement to submit. This he may do at any time before an award has been made, even though it was entered into for a consideration. The revocation must be express, positive and absolute, and notice be given to the other party and to the arbitrators, in order to have it amount to a revocation of the submission.

When a landowner has himself assisted in making the survey of a boundary-line and has himself marked the line through woods, and a conveyance has been made by such line, he cannot years afterwards deny that the line so marked and recognized was the true boundary-line.[3] So if the purchasers of adjoining land take possession and fence their lots soon after a survey is made, it will be presumed that their possession was taken according to lines established.[4] So, too, if a fence exist and be pointed out as the boundary, the person so designating it as a boundary may not thereafter dispute it.[5]

Where a landowner surveys a boundary-line for his land, which is publicly marked, and sells land with reference thereto, he is estopped from denying the correctness of its location as against one locating land with reference thereto.[6]

An agreement for a survey of boundary-lines, if not followed by an actual

[1] 1 Amer. & Eng. Ency. Law 671.
[2] Wait's Engin. & Arch. Jurisp., §§ 508–518, 523; 1 Amer. & Eng. Ency. Law 672, 673.
[3] Chadwell *v.* Chadwell (Tenn.), 23 S. W. Rep. 973; Holland *v.* Thompson (Tex.), 35 S. W. Rep. 19.
[4] Root *v.* Cincinnati (Ia.), 54 N. W. Rep. 206.
[5] Phinney *v.* Campbell (Wash.), 47 Pac. Rep. 502.
[6] New York & T. Land Co. *v.* Gardner (Tex. Civ. App.), 25 S. W. Rep. 737.

survey, cannot affect established boundaries.[1] After an agreement in regard to a boundary all the persons interested on the lands should be produced.[2] When a boundary-line has been fixed by a surveyor employed by several property owners, it is not binding on such owners against an adjoining owner who was not a party to the surveying and who never acquiesced in the award.[3]

Where adjoining owners have located a boundary-line with the obvious intention of making it the true line and have acquiesced therein, it raises a presumption that that is the true line which is not overcome by the mere fact that a survey made long before the government monuments had been obliterated reveals a different line.[4]

Where adjoining owners submit to arbitration the question as to the true boundary-line between them, the award is sufficient to establish the line as between the parties, their heirs and privies.[5] The conclusive effect of a survey establishing a boundary between adjoining owners, made pursuant to statute, may be waived by the parties by agreement or by a new survey.[6]

468. Before Award is Made, Submission to Arbitration may be Revoked.—If the agreement to submit be in writing, then the revocation should also be in writing, and a submission under seal should be revoked by an instrument under seal. The submission may be revoked by change of circumstances, as by the death of either party or one of the arbitrators, unless provisions have been made for such an emergency. The refusal of one of the arbitrators to act may work a revocation, unless the statutes or the submission itself provides for his substitution or release. The bringing of a lawsuit on the same dispute as was referred, before the award has been rendered; the marriage (if at common law) of one of the parties, who was a single woman; the failure to fulfill a condition which by the terms of the submission was to occur before the award, may each and all operate as a revocation. The sale of the tract whose boundary has been submitted revokes the submission, as the submission is not binding upon the purchaser if he bought without notice of the submission.

If one party revoke without the consent of the other, he renders himself liable to an action of damages for the breach of his contract. The damages will be confined to what the other party has actually suffered, and this is so even though a bond has been given and the penalty named.[7]

469. Award of Arbitrators Held Not to Affect the Title to Land.—In New York state there exists a statute which makes awards regarding all matters of real estate absolutely void, but it is held to refer only to cases where a claim to the legal title is involved.[8]

[1] Dyer *v.* Eldridge (Ind.), 36 N. E. Rep. 522.
[2] Donaldson *v.* Rall (Tex.), 37 S. W. Rep. 16.
[3] Kempmann *v.* Heintz (Tex.), 24 S. W. Rep. 329.
[4] Wollman *v.* Ruehle, 75 N. W. Rep. 425.
[5] Kennedy *v.* Farley (Sup.), 31 N. Y. Supp. 274.
[6] Spacy *v.* Evans (Ind.), 48 N. E. Rep. 355 [1897].
[7] 1 Amer. & Eng. Ency. Law 664–666.
[8] 1 Amer. & Eng. Ency. Law 660; 2 *id.* (2d ed.) 801.

Though awards with regard to boundaries may not change, in general, the ownership of strips or small pieces of land, yet such strips or pieces are subjects for arbitration, their establishment not being regarded as a transfer of property, but rather as the determination of the true boundary. The submission need not, therefore, be under seal nor even in writing. If, however, any question as to title or ownership of real estate is to be determined it must be in writing and under seal.[1]

470. Disputes Should be Submitted to Arbitration.—When a surveyor has been engaged to settle a disputed boundary between two parties, and they have agreed to abide by his decision in the matter, it is desirable to make that agreement a submission to arbitration, and he should exercise his persuasion to have it so made in writing and under seal. It gives the surveyor perfect freedom to exercise his free and unprejudiced judgment. He can reprove and resent any urging, pressure, or tendencies brought by either party to swerve him from the cold mathematical results that his instruments, figures, and good judgment give. Being in the employ of both and neither separately, he is in no way under obligations to them, nor they to him.

471. Submission—Its Form and Contents.—Though such a submission is not required by law to be in writing, yet it is recommended in this as in all other business that it be made of record. If the parties mean business and are not of the over-cautious class, they will not generally hesitate to make their submission under seal, binding it with a bond or penalty. A surveyor must be guided in this by the dispositions of the parties, the interests at stake, and the difficulties attending the solution of the controversy. If titles are likely to be affected or property change hands, it is imperative that the submission shall be under seal,[2] and for this reason it is necessary that there be evidence of the submission. A written contract will best establish such an agreement, and it is therefore recommended.

The submission should be drawn in acccordance with the suggestions pointed out in the preceding pages, and should plainly show the intention of the parties as to what they wish to submit, the subject-matter, and to whom they submit it, as arbitrator(s). Frequently the agreement to submit has been entered into before the surveyor is apprised of it, in which case he has only to act according to its terms. The surveyor is to look to the agreement of submission for his duties and powers, and if they are not defined or modified by state statutes he will be guided entirely by the submission, including the papers, maps, and documents to which it refers.[3]

472. Powers of Arbitrator are Sometimes Restricted.—His powers may be restricted by the submission; but if they are not and the submission is

[1] See Jackson *v.* Gager, 5 Cowen 383; Copeland *v.* Wading Riv. Res. Co., 105 Mass. 397; Smith *v.* Bullock, 16 Vt. 592, 663; Ryder *v.* Dodge. 14 Wk. Dig. (N. Y.) 84; French *v.* Richardson, 5 Cush. 450; Bowen *v.* Cooper (Pa.), 7 Watts 311; Davis *v.* Harvard (Pa.), 15 S. & R. 162; Snodgrass *v.* Smith, 13 Ind. 393.

[2] Koon *v.* Hollingsworth, 97 Ill. 52.

[3] 1 Amer. & Eng. Ency. Law 675.

general, he is sole judge of law and facts, and his decision will not be set aside because he has made a mistake as to the law or facts. Frequently submissions are restricted to matters of fact only, which gives the court liberty to review or decide as to matters of law.

The surveyor having ascertained the facts of the case, which would ordinarily be found by a jury, reports them to the court, who upon those facts decides the question as to the law and the rights of the parties to the controversy.

If a surveyor shows in his award an intention to decide the question according to law, for example by giving reasons for his award, and is mistaken as to the law, then the award may be set aside. An agreement between contiguous owners to employ a surveyor to establish a boundary-line does not estop either from showing a mistake in line as run.[1]

A mistake of facts may render an award void when the mistake is of such a nature as to show that the award is not the result of the true judgment of the arbitrator.[2]

473. Mistakes of Surveyor as an Arbitrator.—It must be shown that the mistake has misled or deceived the surveyor, so that he has not exercised his deliberate and fair judgment: some mistake as to facts inadvertently assumed or believed which can be shown to have been contrary to what his judgment was based upon. Good illustrations are the use of false measures: as a tape or chain that is too long or too short, believing them to be correct; the use of a compass to ascertain bearings, when it is afterwards discovered that by accident or fraud the movement of the needle was restrained or disturbed, this being wholly unknown to the surveyor. It must be a pure mistake by which his judgment, as well as the needle, has been swerved from the true direction which it would have taken had it followed the true law understood to govern it.

The mistake must be of a fact upon which the judgment of the surveyor has not passed as a part of his judicial investigation. It must be of such a nature and so proved as to lead to a reasonable belief that he was misled and deceived by it, and that if he had known the truth he would have come to a different result. Then and only then will a court set aside his award. If, however, the mistake was due to some unsound or erroneous theory of magnetism adopted and applied by him in regard to the actual variation of the needle, leading to the same errors as before, it would not be such a mistake as would justify a court in setting aside the award; for it would be an appeal from the surveyor's decision, where he had exercised his judgment.

Another instance suggested is one of mathematical computations. If the surveyor has used logarithms, believing them to be correct, which are afterwards shown to be erroneous, it would be a mistake by which he was misled,

[1] Watrous *v.* Morrison (Fla.), 14 So. Rep. 805.

[2] 1 Amer. & Eng. Ency. Law 709.

his judgment not being fully exercised; but if the surveyor has purposely and deliberately adopted some process of mathematical reasoning or some method of calculation which he believed to be correct, his award cannot be impugned by the testimony of other mathematicians, tending to show that it was erroneous.[1] It is presumed that it was on account of the surveyor's learning, views, and judgment that he was selected by the parties to decide this question between them. His award cannot, therefore, be assailed upon points where this judgment and understanding have been exercised.[2]

Mistakes in charging interest, and errors in computations, which may be corrected and made certain by mathematical calculations, will not avoid an award.[3]

474. Arbitrator must Not Exceed his Powers.—If a surveyor exceeds the powers given him by the submission, he may thereby render his award void.[4] The fact that he has exceeded his power as regards part of the award does not vitiate the remainder of it.[5] It may be valid as to the matters submitted, and void as to matters decided upon but which were not embraced in the submission.[6]

The award must decide all the questions contained in the submission, for material omissions may render it void.[5] To be conclusive it must contain in express terms a distinct determination of the exact points submitted.[7] The surveyor's report or award should be in such language as to show the parties that the matters submitted had been considered and decided by him.[8]

475. Submission to Several Arbitrators.—If there are several persons to whom the question is referred, the agreement of all is necessary to an award, unless it is expressly agreed that a less number may make it.[9] Unless so stipulated, an award signed by three of five referees will not settle the question nor conclude the parties.

476. Arbitrators may Not Delegate their Duties and Powers.—Arbitrators (surveyors) cannot delegate their duties and powers or appoint a substitute for an absent member. Where provisions are made in their submission for the appointment of a substitute, and where "another or others are to be chosen in the place of those unable or unwilling to act," the right to choose substitutes is in the parties and not in the other arbitrators. The arbitrators may not delegate their powers to each other. The decision of a point of law arising out of the dispute may not be decided by one of their number who is a lawyer.[10] They cannot delegate their powers to the court which appointed them, or provide for a further settlement by some other tribunal;

[1] Opinion of Chief Justice Shaw in Boston Water-power Co. *v.* Gray, 6 Met. 169 [1843].
[2] *See* Wait's Engin. & Arch. Jurisp., §§ 429–438.
[3] Gardner *v.* Masters (N. C.), 3 Jones Eq. 462; Clement *v.* Foster, 69 Me. 318.
[4] 1 Amer. & Eng. Ency. Law 675, 676.
[5] Jackson & Co. *v.* Ambler, 14 Johns. 96 [1817].
[6] Bogan *v.* Daughdrill, 51 Ala. 312.
[7] Walker *v.* Simpson (Me.), 13 Atl. Rep. 580 [1888].
[8] Walker *v.* Simpson, *supra*.
[9] Oakley *v.* Anderson, 93 N. C. 108.
[10] Little *v.* Newton, 9 Dowl. 437.

or make their award on the decision of an umpire called in to decide, without exercising their own judgment.[1] They must decide according to their own convictions and judgments to render their award valid.

477. Ministerial Duties of Arbitrators may be Delegated.—Mere ministerial acts may be delegated, such as holding one end of a chain in measuring distances, reading angles and bearings, acts which the inconvenience and customs of surveying would render impracticable or impossible for the surveyor to undertake himself.[2] What the parties seek in referring the dispute to arbitration is the surveyor's personal judgment, discretion, and ability, and the exercise of these they can demand. Any acts that are purely ministerial and do not require the surveyor's personal skill, integrity, and judgment may be delegated.

Technically this would confine the operations of surveying that could be delegated to a very small compass. The simple reading of a tape or of an angle is an act requiring skill and experience, and there is little doubt but that the parties can demand with some justice that these acts be at least under the immediate direction and supervision of the arbitrator if he be a surveyor. The apparent intention of the parties as shown by their submission and the attendant circumstances would have much weight in determining to what extent the surveyor might delegate his duties and powers. Where arbitrators are selected with special reference to their skill, knowledge, and experience, as a surveyor is, he might reasonably be expected to conduct the survey. The extent and magnitude of the survey, the time given for the award, and other similar circumstances may show that no such personal conduct of the work was expected by the parties, but that it was to be accomplished by assistants.[3] Custom may authorize the delegation of certain acts.[4] The methods and customs generally employed in surveying would permit a surveyor's assistants to do the chaining or measuring, and frequently all of the field operations. The extent of the surveyor's business, his usual practice in similar cases, the number of assistants employed by him, and similar facts, if known to the parties, would bear upon the case as evidence of the parties' intentions and of the custom.[5]

Though an arbitrator may not delegate his powers and duties, he may call in and consult accountants, appraisers, lawyers, experts, and other surveyors, but may not leave the decision to them. He may use their opinions as a basis for his own decision, when satisfied of their accuracy. He may employ legal counsel to assist him in framing the award, even the counsel of one of the parties.[6]

[1] 1 Amer. & Eng. Ency. Law 678.
[2] Thorp *v.* Cole, 2 C. M. & R. 367; Harvey *v.* Shelton, 7 Beav. 455.
[3] Palmer *v.* Clark, 106 Mass. 373.
[4] Bodine *v.* Exch. Fire Ins. Co., 51 N. Y. 117; Darling *v.* Stanwood, 14 Allen 504.
[5] Herrick *v.* Belknap, 27 Vt. 673 [1854].
[6] 1 Amer. & Eng. Ency. Law 678.

478. Powers of Surveyors as Arbitrators to Summon Witnesses and Conduct Investigation.—Arbitrators have no power by common law to summon witnesses or administer oaths. It is, however, frequently given to them by statute in different states. When there is no statute bestowing such power, they must call to their assistance some officer who has the power, if the parties desire the testimony to be under oath. Where power is given to compel the attendance of witnesses they are protected from arrest, and the parties and their counsel as well. In conducting a case the arbitrator is sole judge of all questions ordinarily within the power of a court. He is not bound by rules of law or of custom. He may adjourn, recall, and continue the case as he sees fit. He may reopen a case to receive new evidence even after he has prepared his award, and at any time before delivering it, or he may refuse to reopen it, according to his discretion. If he is not an officer of a court, or deciding a question referred to by the court, he may make his own rules as to witnesses and evidence. He may receive evidence that a court would not admit, and permit witnesses to testify who are legally incompetent. Though these arbitrary powers are conceded to arbitrators, it is by no means recommended that they be exercised. They may be evidence of fraud and oppression, which will be fatal to the award rendered.[1]

The arbitrator must hear all the evidence, but he may limit or not, in his discretion, the number of witnesses and the quantity of evidence upon matters which have been particularly submitted to his judgment and in which he has special skill and knowledge. It is within his discretion whether or not he will comply with the request of one of the parties to go and view premises with reference to claims of a builder for work done.[2]

In the absence of any arrangement in the submission the arbitrator may name the time and place of hearing, he may postpone the appointment or revoke it. If one party absents himself and the arbiter has reason to believe the absence is intentional and intended to defeat the object of the reference and to prevent justice, he may give that party notice of his intention to proceed with the case at a specified time and place, *ex parte*, or when either party has failed to appear and has not given reasonable excuse. An arbitrator may properly visit a sick or infirm person at that person's own residence to take testimony.

479. Arbitrators must Receive Evidence.—Under a submission to arbitrators by which they are to settle the boundary-lines and all matters of difference in relation thereto, a refusal by the arbitrators to receive and consider certain deeds and plats offered for the purpose of showing the lines of one of the parties is sufficient reason for setting aside the award;[3] but not on the ground that the arbitrators refused to hear pertinent testimony, when the party

[1] 1 Amer. & Eng. Ency. Law 679, 680.
[2] Wait's Engin. & Arch. Jurisp., §§ 527–532; 1 Amer. & Eng. Ency. Law 682.
[3] Hurdle *v.* Stallings (N. C.), 13 S. E. Rep. 720 [1891].

objecting to the award only announced his willingness to introduce testimony without actually offering any.[1]

480. Surveyors as Arbitrators must Act Together.—If there are more than one arbitrator, they must all act together; the absence of one, or his refusal to act, puts a stop to proceedings. The disputants are entitled to the exercise of the judgment and discretion and to the benefit of the views, arguments, and influence of each one of the persons whom they have chosen to judge for them; and they are entitled to these not only in the award, but at every stage of the arbitration. This is so even where the submission does empower a majority to decide. This principle is strictly applied. It was applied to a case where an award was determined upon by all together, drawn up by a counselor, and afterwards carried around to each separately for execution. An award by three arbitrators, signed by two of them in each other's presence, and by the third in the presence of one or the other at different times and places, was set aside. All must act together throughout the deliberations which lead to the award, and all must together execute the award at the same time and place and in the presence of each other.[2]

481. Notice to Parties of Hearing.—The parties must be heard in the presence of each other. At the same time that the surveyor makes the survey it is customary to notify the parties, that they may be present. It is submitted that this latter courtesy to the parties is not necessary, nor even advisable, if the surveyor can make the survey from the deeds alone without the parties' assistance. They are generally a great annoyance, constantly offering assistance, suggestions, and objections, all of which delay the work. Not infrequently their presence renews old quarrels between the parties, which increases the animosity and makes the question more difficult of an amicable settlement. Surveyors are too familiar with these scenes to require a detailed description.

Notice need be given only when evidence is to be received; and if the surveyors or arbitrators can complete their survey without the presence of either party or of parties interested, it is recommended that it be so completed. If either party is to be present, as in cases where the boundary is near or in view of the residence of either adjoining owner, it is deemed better to notify both so that they may be present. If they are not notified, and one should be present and inquiries should be made of persons present, it might prove fatal to the award.[3] Where no evidence is received, no notice need be given to the parties, as, for instance, when the arbitrators meet for the purpose of consultation and to draft and sign the award.

482. Compensation of Surveyors as Arbitrators. — An arbitrator is entitled to pay for every day he is necessarily employed, including the delib-

[1] Stemmer *v.* Scottish Union & National Ins. Co. (Or.), 53 Pac. Rep. 498 [1898].

[2] 1 Amer. & Eng. Ency. Law 684.

[3] 1 Amer. & Eng. Ency. Law 686.

eration; and his compensation will not be defeated by reason of failure to render all the services expected of him. He is entitled to reasonable compensation for all services actually rendered or expenses incurred; even if the submission does not provide for it, and may award fees to himself. He has a lien on the award for the amount of his fees, and may retain it until they are paid.[1] Each party is liable to him for the full amount.[2] It seems that when there are several arbitrators each must sue for the compensation to which he is entitled.[3]

483. Surveyor's Powers are at an End when Award is Made.—An arbitrator's (surveyor's) duties and powers end with the making and delivery of the award according to the terms of the submission. He may not after rendering the award review his decision, exercise a fresh judgment on the case, or alter the award in any particular. The boundary once determined and located by the surveyor cannot be changed subsequently. If he attempts an alteration it is without effect, and the original award will stand. His powers are so entirely at an end with the execution and delivery of the award that he cannot even correct a manifest error in the calculation of figures, or in misplaced words or names.* The award stands as executed and delivered even in the face of apparent mistakes.[4]

484. Form of Award.—An award to be valid requires no particular form, but must express an actual decision, something more than mere propositions and suggestions. The award should decide the question at issue and decree the remedy. It must be final and certain, and if expressed in such language as laymen acquainted with the subject can understand, technical precision and certainty are not necessary.

485. The Award must be Certain and Definite.—Awards concerning real estate or boundaries of land are sufficiently certain if they can be located so as to give possession of the premises, and to designate the limits by metes and bounds. Any description sufficient as a conveyance should answer in an award.† An award is certain if it gives directions so that any competent surveyor can find the corners and lines by following those directions.[5] If the terminal points of a disputed line are fixed with accuracy, and the course and distances given, it is not uncertain.[6] An award of three-quarters of the whole section taken from the upper part of said land,[7] or "up to the original claim line, if the line can be ascertained," or "the north line, so called, between A and B" were all held sufficiently certain[8] if they could be located by com-

[1] Clement *v.* Comstock, 2 Mich. 359.
[2] Young *v.* Starkey, 1 Cal. 426.
[3] *See* Wait's Engin. & Arch. Jurisp., § 533.
[4] 1 Amer. & Eng. Ency. Law 689.
[5] Rogers *v.* Carrothers, 26 W. Va. 238, 246; Crawford *v.* Orr, 84 N. C. 246.
[6] Crawford *v.* Orr, 84 N. C. 246.
[7] Duncan *v.* Duncan, 1 Ired. (N. C.) 466.
[8] Caldwell *v.* Dickinson, 13 Gray (Mass.) 365.

* *See* Secs. 467, 473, *supra.*

† *See* Secs. 541-559, *infra.*

petent surveyors.[1] An award was held to be valid that provided that a subsequent survey should fix the boundary-line in dispute.[2] The award may refer to field-books, maps, and documents, if sufficiently described and accessible to the parties.[3]

If the award fail to disclose where the boundaries were located by the arbitrators, it is not sufficient to show an agreed boundary.[4] An award stating that the arbitrators did run "the following described line as the dividing-line and do hereby establish the same as the true dividing-line," giving a description of the line, is void where it appears from statements by the arbitrators while running the line that they did not intend to follow the terms of the submission to run the dividing-line between the lands of the parties, but a proposed line.[5] So is a boundary-line uncertain when fixed from one known monument to another by reference to land of one of the parties,[6] or when one of the monuments named in the award is by parol evidence proved not to exist.[7] But an award ordering a conveyance of real estate up to the original claim-line is not void for uncertainty, as such a line may be ascertained.[8]

486. The Award must be Possible.—The award must not require the doing of something that is illegal or impossible in itself; for if it contains such a decree, it will be void for so much at least. Thus a decree in an award will be void if it require one to do a thing in the past, or to turn the course of a river. The impossibility must be apparent upon the face of the award. To order a person to pay a sum greater than what he may possess is not an impossibility that will avoid the award.[9]

[1] *But see* Clark *v.* Burt, 4 Cush. (Mass.) 396; Morse on Arbitration 428; Giddings *v.* Hadaway, 28 Vt. 342; 2 Amer. & Eng. Ency. Law (2d ed.) 761.

[2] 2 Hard. (Ky.) 318.

[3] Darge *v.* Haricon I. Mfg. Co., 22 Wis. 691; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96.

[4] Hayden *v.* Brown (Ore.), 53 Pac. Rep. 490 [1898].

[5] Walker *v.* Simpson (Me.), 13 Atl. Rep. 580 [1888].

[6] Clark *v.* Burt, 4 Cush. (Mass.) 396.

[7] Giddings *v.* Haddaway, 28 Vt. 342.

[8] Williams *v.* Warren, 21 Ill. 541.

[9] Russell on Arbitration 305; Young *v.* Renbin, 1 Dall. (U. S.) 119; Yeamans *v.* Yeamans, 99 Mass. 585; Maybin *v.* Conlon, 4 Dall. (U. S.) 298; 2 Amer. & Eng. Ency. Law (2d ed.) 772.

CHAPTER XXVII.

BOUNDARIES ESTABLISHED BY AGREEMENT OR ACQUIESCENCE.

491. Settlement of Controversies is Encouraged by the Courts.—It is a policy of the courts and of the law, and presumably of the legal profession, to settle disputes by amicable adjustments, and to do all within their power to quiet titles. The exclusion of evidence of parties offering to settle before or after a suit is brought, the passing of statutes of limitations and of frauds, both show this effort on the part of the law to quiet titles and make secure the rights of citizens. Likewise it is the policy of the courts to encourage parties themselves to settle their disputes as to boundaries, and to adjust them between themselves; and when this has been done and the parties have agreed to a certain location of their boundaries, they are so bound, and courts will not relieve them from their agreement, even though they do not conform to the description in the deed, and include more or less land than is mentioned in the deed.[1] Under certain conditions it is not necessary even that there be a covenant or agreement, but mere acquiescence is sufficient to establish the boundary conclusively and finally.[2]

492. Determination of Boundaries by Mutual Consent. –Location of the boundary by the grantor who made the survey and marked it by stakes, when coupled with evidence of an acceptance by the grantee of such location, by setting his fence by the stakes, is competent evidence of a location by mutual consent, which, when once made, will be conclusive upon both parties.[3]

By agreement landowners may establish a final and decisive boundary without reference to the line of the government survey.[4] Where parties acquiesce for the statutory period in a line between two quarter sections owned by them respectively, though the line may vary from the government survey, it becomes the boundary-line between the quarters.[5]

A boundary-line supposed to be the true boundary, and long acquiesced

[1] Emery *v.* Fowler, 38 Me. 99; Culbertson *v.* Duncan (Pa.), 13 Atl. Rep. 966 [1888]; Kellogg *v.* Smith (Mass.), 7 Cush. 375.

[2] Miles *v.* Barrows, 122 Mass. 579.

[3] Jackson *v.* Perrine, 35 N. J. Law 137; New York & T. Land Co. *v.* Gardner (Tex.), 25 S. W. Rep. 737; Root *v.* Cincinnati (Iowa) 54 N. W. Rep. 206.

[4] Cox *v.* Daugherty (Ark.), 36 S. W. Rep. 184.

[5] Husted *v.* Willoughby (Mich.), 75 N. W. Rep. 279 [1898]; Stark *v.* Homuth (Tex.), 45 S. W. Rep. 761 [1898]. *But see* Ward *v.* Ihler (Mo.), 34 S. W. Rep. 251.

in as such, affords better evidence of the location of the true line than a survey made after the original monuments have disappeared.[1]

Where landowners agree to select men to run a dividing-line, and, having run the line from one terminal point to the other, the men rerun and retrace it to the beginning point, the retraced line forms a substantial part of the agreement and cannot be dispensed with except by consent of the owners.[2]

Long practical acquiescence of the parties concerned in a supposed boundary-line should be regarded as such an agreement between them as to be conclusive even if the line were originally located erroneously.[3]

493. Boundaries Designated by Grantor at Time of Transfer.—When a person sells part of a tract of land by general description, and himself subsequently fixes the corners of lines or goes upon the land with the grantee and designates or points out the monuments or lines of fences which bound it, and permits the grantee to make improvements with reference to lines thus fixed or designated, he will be bound by such boundaries.[4] A statement by an owner to the purchaser of an adjoining tract that the boundary-line is at a specified place does not of itself constitute a binding agreement that the line shall be there, where the one making such statement was mistaken as to its location.[5]

Where a dividing-line has been established before purchases are made of land on each side of it, and the deeds have been made, and are known by the parties to have been made, with reference to that line, they, and all the persons claiming through them, are bound by it.[6] Where a boundary-line was fixed as the utmost extent of a designated piece of land, and the question whether or not it was bounded by high- or low-water mark depended on the date of that conveyance, which was not definitely established, it was held that the boundary fixed by general repute at high-water mark, and which has been recognized for many years as the true line, will be adopted by the courts.[7]

Where a certain line was pointed out to a purchaser by the grantor as the boundary-line, the fact that an adjoining landowner admitted such line to be the true boundary does not estop him to deny its location, the purchaser not having bought on his representation.[8]

Where, in a contract for the purchase of a piece of land enclosed by a fence which extended beyond the southern line and enclosed a strip of one and a half acres, belonging to a railroad company, on which were trees and through which was the only passage from the dwelling to the public road, and

[1] Hoffman *v.* City of Port Huron (Mich.), 60 N. W. Rep. 831.

[2] Wheeler *v.* State (Ala.), 19 So. Rep. 993.

[3] Smith *v.* Hamilton, 20 Mich. 433; Joyce *v.* Williams, 26 Mich. 332, *cases cited in foot-note to Stoddard's ed.*

[4] Gallagher *v.* Riley (Tenn.), 35 S. W. Rep. 451; Scott *v.* Means & Russell Iron Co. (Ky.), 19 S. W. Rep. 189. *See also* Beckman *v.* Davidson (Mass.), 39 N. E. Rep. 38.

[5] Davidson *v.* Pickard (Tex.), 37 S. W. Rep. 374.

[6] Briscoe *v.* Puckett (Tex.), 12 S. W. Rep. 978.

[7] Forest R. Lead Co. *v.* Salem (Mass.), 42 N. E. Rep. 802.

[8] Davidson *v.* Pickard (Tex.), 37 S. W. Rep. 374.

no information was given as to the location of the boundary-lines, a court will not decree a specific performance of the contract of purchase on proof that the defendant was mistaken as to a material fact by the omission of the plaintiff to point out the trees, and that this was so whether the omission was intentional or otherwise.[1]

Where after the execution of a deed, a controversy arises as to which one of two branches is meant by a clause in the deed which states "thence with that line to a stake on the west bank of the branch," though there be evidence that the parties agreed by parol where the true boundary ran, it is proper for the court to refuse to instruct the jury that by such verbal agreement the parties could alter the boundaries as fixed in the deed, and would be estopped from disputing the new location so agreed upon.[2]

494. Surveyors may Not Change Boundaries that Parties have Themselves Fixed.—Surveyors are often called upon to make surveys and determine boundary-lines that have already been irrevocably settled by the parties themselves. It is a waste of time and patronage for a surveyor to undertake such a survey, when he knows, or should know, that it cannot avail either party. A few pointed inquiries by the surveyor, when called upon to determine a boundary-line, will reveal the true state of affairs; and good sound advice to the disputing parties will, if they profit by it, save them much trouble and expense. A surveyor should know when he is working to some purpose and when it is useless to undertake a task, or when, if undertaken, his determination may be overruled and declared unavailing by a court of law. Knowing that his services are in vain and to no purpose, can he honestly render them without advising his patrons of the fact? By such a course he may sacrifice a professional engagement to another who is not so conscientious or who is less enlightened, but he will not be the loser in the end. A conscientious, well-informed engineer or lawyer will never suffer by rendering sound advice to his client, though an unscrupulous and ignorant professional man may profit by making the most out of all who come to him; and a good engineer, who knows that a boundary is already settled in law, will not employ his time in attempting to establish a boundary or survey which the courts will not sustain.

The object of a survey is frequently to establish a boundary between coterminous owners, but the boundary may be definitely and conclusively determined by the adjoining landowners themselves, without assistance of surveyors and without recourse to the courts. A simple agreement upon any reasonable line as the boundary-line, followed by a possession and an occupation according to that line, may preclude either party from ever afterwards disputing that the line agreed upon is the true boundary-line. Courts have repeatedly refused to change such a line, and surveyors cannot make it other-

[1] Campbell *v.* Durham (Ala.), 5 So. Rep. 507 [1889].

[2] Buckner *v.* Anderson (N. C.), 16 S. E. Rep. 424.

wise. The parties themselves could perhaps mutually agree to rescind the agreement and submit it to a surveyor or to the court, but one of them could not. The agreement need not be under seal or in writing even;[1] but a simple parol agreement accompanied by possession thereto will suffice. Such agreements are not, therefore, within the statute of frauds,[2] because they are not considered as extending to titles. They do not operate as conveyances so as to pass title from one to another, but proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such case the agreement serves to fix the line to which the title of each extends.[3] It is not necessary even that there should have been a previous dispute about the line to give validity to such an agreement.[4]

Where title by adverse possession is complete, it is not affected by a parol promise of the person holding the title to join with an adjacent owner in a survey to determine the true line between their respective lands.[5]

495. The Agreement and Acquiescence does Not Effect a Conveyance.* —Land cannot be granted except by written instrument duly signed, sealed, acknowledged, and recorded; and therefore tenants-in-common of an estate cannot terminate the unity of their possession, or create a right in the nature of an easement, by a parol agreement for the partition of lands.

It seems a parol partition may be made by such co-owners, provided each party takes and retains exclusive possession of the portion allotted to him for the period required by the statute of limitations to give title to adverse possession.[6]† However, this device cannot be resorted to to convey land, and thus avoid the requirements of the statute to convey under seal and record the conveyance; and if the true line is known, then any change in the boundary-line which requires the transfer of any portion of the land on one side of the line from the one to the other must be in writing and according to the manner prescribed by law, to be valid.[7]

Adjoining owners need not have title in fee-simple to become a party to an agreement as to boundaries, but possession and assertion of ownership under a contract to purchase are sufficient to constitute the occupant an adjoining owner for the purpose, and to enable him to make a valid agreement for the establishment of division-lines.[8] The contract is founded upon mutual promises and concessions, and will be upheld the same as any con-

[1] White *v.* Spreckles, 75 Cal. 610 [1888]; Moyle *v.* Connolly, 50 Cal. 295 [1875].

[2] Ferguson *v.* Crick (Ky.), 23 S. W. Rep. 668; *semble*, Brown *v.* Bailey (Pa.), 28 Atl. Rep. 245.

[3] White *v.* Spreckles, 75 Cal. 610 [1888]. *See* Helm *v.* Wilson, 76 Cal. 476; Gwynn *v.* Swartz, 40 Alb. L. J. 374 [1889], *and cases cited.*

[4] Helm *v.* Wilson (Cal.), 18 Pac. Rep. 604 [1888]; Silverer *v.* Hansen (Cal.), 20 Pac. Rep. 136 [1889].

[5] Lamoreaux *v.* Creveling (Mich.), 61 N. W. Rep. 783.

[6] Taylor *v.* Millard, 118 N. Y. 244 [1890].

[7] Jenkins *v.* Trager, 40 Fed. Rep. 726.

[8] Silverer *v.* Hansen (Cal.), 20 Pac. Rep. 136 [1889].

See Secs. 41–50, *supra.*

† *But see* Sec. 516, *infra.*

tract.[1] Not being in writing it cannot convey any direct interest or title in land, nor can title to land be established by parol evidence of a verbal agreement establishing boundaries between coterminous owners.[2]

Only those landowners (their heirs, successors, or assigns) who are parties to the agreement are bound by the agreement,[3] and it is incompetent to prove that an adjoining landowner who claims under the same grant does not claim beyond the line in controversy, if none of the parties claim through him and he is not interested in the suit.[4]

496. Parol Agreements to Settle Disputed Boundaries.—It is quite well settled by decisions that where the owners of adjoining lots of land agree upon and establish a division-line between them by express parol agreement, and their agreement is immediately executed, and is accompanied by actual possession according to such line, the agreement is binding and conclusive, and such division-line may not be disturbed though it may afterwards appear that it is not the true line according to the paper title.[5] *

497. Proof of Agreement and Acquiescence.—Some cases hold that an agreement must be shown by a preponderance of evidence, and that the fact that the land was occupied according to the agreement by acquiescence merely is not sufficient to establish it.[6] If no express agreement is shown, long acquiescence by one proprietor in the line assumed by the other is evidence from which an agreement may be inferred.[7] Acquiescence for ten years by an adjoining proprietor in a boundary established by the other is evidence, at least, of a parol argeement so fixing the boundary-line.[8]

Whether or not a person who stands by and sees a division-line run between his land and the land of another without making any objection thereby assents to it,[9] or whether or not the boundary-line was established by acquiescence, is sometimes held a question for the jury.[10]

A Missouri case holds that direct evidence of the agreement is not necessary, but that it may be shown by facts and circumstances, including long acquiescence and recognition.[11]

[1] Finley *v.* Funk (Kan.), 12 Pac. Rep. 15 [1887].

[2] Presnell *v.* Garrison (N. C.), 29 S. E. Rep. 839 [1898].

[3] Donaldson *v.* Rall (Tex.), 37 S. W. Rep. 16.

[4] Bailey *v.* Baker (Tex.), 42 S. W. Rep. 124.

[5] Voight *v.* Raby (Va.), 20 S. E. Rep. 824; Kellogg *v.* Smith, 7 Cush. (Mass.) 375.

[6] St. Bede College *v.* Weber, 168 Ill. 324; Heinz *v.* Cramer (Iowa), 51 N. W. Rep. 173; Iverson *v.* Swan (Mass.), 48 N. E. Rep. 282; Lecomte *v.* Toudouze (Tex.), 17 S. W. Rep. 1047; Horton *v.* Brown (Ind.), 29 N. E. Rep. 414; Dauer *v.* Hildebrandt (Mich.), 68 N. W. Rep. 145.

[7] Kellogg *v.* Smith, 7 Cush. 375; Jones *v.* Smith, 64 N. Y. 180 [1876]. *But see* Heinz *v.* Cramer (Iowa), 51 N. W. Rep. 173, which held that a mere pointing out of boundaries was not sufficient. *And see* Coleman *v.* Drane (Mo.), 22 S. W. Rep. 801.

[8] Gwynn *v.* Schwartz, 40 Alb. L. J. 374 [1889].

[9] Wheeler *v.* State (Ala.), 19 So. Rep. 993.

[10] Manistee Mfg. Co. *v.* Cogswell (Mich.), 61 N. W. Rep. 884.

[11] Ernsting *v.* Gleason (Mo. Sup.), 39 S. W. Rep. 70.

* *See* Sec. 492, *supra.*

A boundary-line may be established by agreement or by acquiescence in and acceptance and recognition of a line as a boundary.[1]

498. Agreements in Regard to Boundaries Not in Dispute.—In some cases it is also held that there must have been a dispute in regard to the line.[2] If there has not been sufficient adverse possession (for the full statutory period) to make a title, the decisions depend on the force of the parol agreement and on the occupation of the land according to such agreement.

An agreement fixing upon a permanent line when both parties are ignorant of the true line, followed by possession in accordance therewith, will bind the parties and persons claiming under them.[3] It has been held not binding on subsequent purchasers if it were an oral agreement and changed the legal construction of the title-deed.[4] When, however, the parties have attempted to survey and mark the true division-line, and in doing so have made a mistake, there being no dispute in regard to it, neither they nor those claiming under them are stopped from claiming to the true line.[5] The same was held when one of the landowners had built a fence on what he supposed to be the true boundary-line without any agreement.[6]

The acquiescence or admission of the owner of land, made under a mistake as to his rights, will neither estop nor prejudice him from subsequently enlarging his possession to the limits of his deed, provided no actual adverse possession has intervened to defeat his title.[7]

The rule will not fix the boundary if it afterwards appears that the adjustment is not in accordance with the true paper title, where the boundary is clearly located by the deed, and the grantee either through mistake or fraud has not received a conveyance of the full quantity of the land bargained for.[8]

499. Parties and Grantees may be Bound by Agreements.—The fact that a description refers to monuments not actually in existence at the time, but to be erected by the parties, does not render the conveyance void if the parties have since been upon the land and deliberately erected the monuments. They will be bound by them as if they had been erected before the deed was made, and it is immaterial that the monuments so erected do give one party

[1] Wardlow *v.* Harmon (Tex. Civ. App.), 45 S. W. Rep. 828 [1898].

[2] Gayhart *v.* Cornett (Ky.), 42 S. W. Rep 730 [1897]; St. Bede College *v.* Weber, *supra; semble*, Teass *v.* St. Albans (W. Va.), 17 S. E. Rep. 400.

[3] Ernsting *v.* Gleason (Mo.), 39 S. W. Rep. 70, Watrous *v.* Morrison (Fla), 14 So. Rep. 805; Voight *v.* Raby (Va.), 20 S. E. Rep. 824; Benson *v.* Daly (Neb.), 56 N. W. Rep. 788; Sebastian *v.* Keeton (Ky.), 29 S. W. Rep. 23; Patten *v.* Findley (Sup.), 18 N. Y. Supp. 683; Lecomte *v.* Toudouze (Tex.), 17 S. W. Rep. 1047; Carstarphen *v.* Holt (Ga.), 23 S. E. Rep. 904; Chadwell *v.* Chadwell (Tenn.), 23 S. W. Rep. 973; Sherman *v.* State (Ala.), 17 So. Rep. 103.

[4] Shaffer *v.* Hahn (N. C.), 15 S. E. Rep. 1033.

[5] Hatfield *v.* Workman (W. Va.), 14 S. E. Rep. 153. *But see* Lecomte *v.* Toudouze (Tex.), 17 S. W. Rep. 1047.

[6] Iverson *v.* Swan (Mass.), 48 N. E. Rep. 282; White *v.* Spreckles, 75 Cal. 610 [1888].

[7] White *v.* Ward (W. Va.), 14 S. E. Rep. 22.

[8] Delong *v.* Baldwin (Mich.), 69 N. W. Rep. 831.

more than the quantity described in the deed,[1] or do not comport with the lines specified in the deed.[2]

If a grantor has agreed to a certain fence as the bounding-line, though located and built after the conveyance, and he has acquiesced therein, and subsequently transfers his holdings, describing the line as bounded by the land of the adjoining party or by the line bounding his lot, it will confine the transferee and his subsequent grantees to the fence agreed upon and acquiesced in even though it does not conform to the original line as described in the deeds.[3]

This has been held true even when the acquiescence has not been for the prescriptive or statutory period required by law to secure title by adverse possession.[4]

The line so established is not only binding upon the parties alone, but upon their heirs and assigns and all others claiming under them, even though it does not agree exactly with the metes and bounds called for in the deeds.[5]

The dividing-line must have been acquiesced in by the parties with knowledge of the facts of its situation and marking; but it need not appear that they knew of the terms, or even existence, of the distribution which first divided their land.[6] In such cases the party is prevented from disputing and denying the boundary-line adopted, under the doctrine of estoppel, which requires that there should have been actual, constructive, or implied knowledge on the part of the party estopped, and ignorance of the other acting upon the incorrect settlement, to estop the former from asserting his claim within the period of limitation.[7] It makes no difference that the settlement is in writing if it does not amount to a conveyance.[8] A party may be estopped on the ground that he should have known the correct line.[9]

There is no estoppel unless there has been an actual or implied agreement.[10] A mere survey by adjoining owners without any agreement creates no estoppel;[11] but a survey and marking of lines may estop the party making it.[12] A verbal agreement made with knowledge of the facts and acted upon is sufficient.[13]

In Wisconsin there is no estoppel with regard to boundaries if the true line can be ascertained by the survey.[14] The estoppel as to boundaries where

[1] Lerned *v.* Morrill, 2 N. H. 197.
[2] Makepeace *v.* Bancroft, 12 Mass. 469.
[3] Knowles *v.* Toothaker, 58 Me. 172; Anderson *v.* Jackson (Tex.), 13 S. W. Rep. 30.
[4] Emery *v.* Fowler, 38 Me. 102.
[5] Culbertson *v.* Duncan (Pa.), 13 Atl. Rep. 966 [1888]; Sheldon *v.* Atkinson (Kan.), 16 Pac. Rep. 68 [1888].
[6] Rathbun *v.* Geer, 64 Conn. 421.
[7] Davenport *v.* Tarpin, 43 Cal. 598; Pitcher *v.* Dove, 99 Ind 175; Lemmon *v.* Hartrook, 80 Mo. 13; Evans *v.* Miller, 58 Miss. 120; Kirchner *v.* Miller, 39 N. J. Eq. 355; Raynor *v.* Timerson, 51 Barb. (N. Y.) 517; Reed *v.* McCourt, 35 N. Y. 113; Hass *v.* Plantz, 56 Wis. 105.
[8] Bradbury *v.* Corry, 59 Me. 494.
[9] Greene *v.* Smith, 57 Vt. 268; Louks *v.* Kenniston, 50 Vt. 116.
[10] Chapman *v.* Crooks, 41 Mich. 595.
[11] Spring *v.* Hewston, 52 Cal. 442.
[12] Singleton *v.* Whiteside, 5 Yerg. (Tenn.), 36.
[13] Keer *v.* Hitt, 75 Ill. 51.
[14] Hartung *v.* Witte, 59 Wis. 285.

there has been no conveyance does not operate to preclude a party from claiming under rights subsequently acquired.[1]

The estoppel should be pleaded or evidence of the settlement of the boundary between the parties may be refused.[2] In any case, if the estoppel be pleaded, it should be pleaded with certainty, and enough should be given to show clearly the facts upon which the estoppel is to be founded. If there has been no opportunity to plead the facts, they may be available as an estoppel.[3]

500. Acquiescence and Occupation Required for What Period.—No particular time appears to have been settled as necessary during which the occupancy, after mutual agreement, should have continued; and the length of time has been different in the different cases. It has been held that the rule may be regarded as well settled, in a number of states at least (Illinois, Michigan, Massachusetts, Maine, New Hampshire), that the period need not be equal to the full period prescribed by the statute of limitations.[4] This rule seems to apply equally to agreements between governments and between individuals.[5] Some periods which have been held sufficient to preclude parties to such agreements are here collected to show the uncertain condition of the law.

501. Length of Time Required to Occupy and Acquiesce.—Parol assent by one of two adjoining owners to the location of a boundary-fence between them, and the actual erection of the fence by the other in accordance with such assent, followed by mutual occupation and acquiescence for a long time, will preclude the parties from denying it to be the true line.[6] What is meant in this case by occupation and acquiescence for a long time is not definitely settled in the decisions.

A few months was held not sufficient to change the true line, or to preclude the assenting party from asserting his rights in accordance with the true line. Such an assent has been declared at most to be but a license, so as to prevent an action of trespass until revoked, which revocation may be made at any time before the period mentioned, as a long time has elapsed.[7] Some-

[1] Donaldson *v.* Hibner, 55 Mo. 492; Dillett *v.* Kemble, 10 C. E. Greene, (N. J.) 66.

[2] Knudson *v.* Omanson (Utah), 37 Pac. Rep. 250.

[3] Bigelow on Estoppel (6th ed.), 671, *and cases cited.*

[4] St. Bede College *v.* Weber, 168 Ill. 324 [1897]; McNamara *v.* Seaton, 32 Ill. 500 [1876]; Yates *v.* Shaw, 24 Ill. 367; Bauer *v.* Gottmanhausen, 65 Ill. 499. *But see* Carleton *v.* Reddington, 1 Fost. 291; Fahey *v.* Marsh, 40 Mich. 236 [1879], *and many cases cited by counsel;* Crowell *v.* Manges, 2 Gilm. 419; Tolman *v.* Sparhawk, 5 Metc. 469; Brewer *v.* R. R. Corp., 5 Metc. 478; Moyle *v.* Connolly, 50 Cal. 295 [1875]; Smith *v.* Hamilton, 20 Mich. 433 [1870]; Beardsley *v.* Crane (Minn.), 54 N. W. Rep. 740; Benson *v.* Daly (Neb.), 56 N. W. Rep. 788; White *v.* Peabody (Mich.), 64 N. W. Rep. 41; Lowndes *v.* Wicks (Conn.), 36 Atl. Rep. 1072; Elmore *v.* Davis (S. C.), 26 S. E. Rep. 680; Tyler's Law of Boundaries 334, 335.

[5] Jenkins *v.* Trager, 40 Fed. Rep. 726.

[6] Reed *v.* McCourt, 41 N. Y. 435 [1869]; Lowndes *v.* Wicks (Conn.), 36 Atl. Rep. 1072.

[7] James, J., in Reed *v.* McCourt, 41 N. Y. 435 [1869].

thing more than a few years' occupation is necessary to confer title and estop the party who has merely assented.[1] A period of four or five years was held insufficient;[2] as also eight years, and even eleven years.[3] In New York it was held that scarcely less than twenty years' acquiescence and mutual occupation would conclude the parties[4] and prevent their denying it to be the true line.[5]

This it is submitted is good law. A mere acquiescence in a boundary for any length of time less than the full statutory period of limitations should not preclude the owner from asserting the true boundary.[6] The decisions of the New York courts are founded upon the Code of Civil Procedure, § 368, which provides that, "In an action to recover real property, . . . the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law, and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title for twenty years before the commencement of the action."[7]

Without an agreement between the parties there can be no doubt but that the acquiescence and occupation must have been for the full statutory period.[8] An instruction "that acquiescence in a line, without an agreement as to its correctness, does not bind a party" unless extending for more than twenty years, is not misleading as tending to tell the jury that parties could not settle a disputed line without an agreement that it was the correct line.[9]

The maintenance by owners of adjoining lands of a line-fence up to which each claims and occupies is a concession by each of the open and adverse possession by the other of that which is on his side of such fence, which, after twenty-one years, will give title.[10]

The agreement and acquiescence should be clearly shown, and it should be executed or concluded. If in an action of ejectment an order be entered by consent that a certain line described is the true line, and that the surveyor should go on the land and establish it, and the order is never carried into

[1] Kipp *v.* Norton, 12 Wend. 127, *and cases cited;* Stuyvesant *v.* Dunham, 9 Ill. 61; Baldwin *v.* Brown, 16 N. Y. 363. *See* Lowndes *v.* Wicks (Conn.), 36 Atl. Rep. 1072.

[2] Jackson *v.* Douglass, 8 Ill. 367.

[3] Adams *v.* Haskell, 16 Wend. 285; Reed *v.* McCourt, 41 N. Y. 435, *and cases cited.*

[4] Reed *v.* McCourt, 41 N. Y. 435.

[5] Stuyvesant *v.* Dunham, 9 Ill. 61; Smith *v.* Bullock, 16 Vt. 592 [1844].

[6] Hinckley *v.* Crouse, 125 N. Y. 730; Pearsall *v.* Westcott, 51 N. Y. Supp. 663 [1898]; Clark *v.* Davis (Super. Ct.), 19 N. Y. Supp. 191, 28 Abb. N. C. 135; Williams *v.* Schantz (Iowa), 55 N. W. Rep. 202, *ten years;* Welton *v.* Poynter (Wis.), 71 N. W. Rep. 597; Delong *v.* Baldwin, 69 N. W. Rep. 831; Nolan *v.* Harned (N. Y.), 13 App. Div. 155. *See* Butler *v.* Vicksburg (Miss.), 17 So. Rep. 605. *Accord,* Doolittle *v.* Bailey (Ia.), 52 N. W. Rep. 337; Omensetter *v.* Kemper, 6 Pa. Super. Ct. Rep. 309 [1897]; Tritt *v.* Hoover (Mich.), 74 N. W. Rep. 177 [1898]; Dyer *v.* Eldridge (Ind.), 36 N. E. Rep. 522.

[7] Clark *v.* Davis (Super. N. Y.), 19 N. Y. Supp. 191, 28 Abb. N. C. 135; *semble,* Kennedy *v.* Erdman (Pa.), 28 Atl. Rep. 643.

[8] Beardsley *v.* Crane (Minn.), 54 N. W. Rep. 740.

[9] Henderson *v.* Dennis, 177 Ill. 547 [1898].

[10] Reiter *v.* McJunkin (Pa. Sup.), 33 Atl. Rep. 1012.

effect, and the case is dismissed without any line being established, the parties remaining in possession as they were before, the agreement will be abandoned, and the order will not be conclusive as to the rights of the parties.[1]

If, where the fence is removed from the line claimed by plaintiff and is rebuilt on the boundary-line as claimed by the defendant, the plaintiff stated that he would have a resurvey to determine the boundary, and would not abide by the survey which defendant caused to be made, the plaintiff is not precluded from setting up a claim to the land between the disputed boundary-lines by adverse possession.[2]

502. Period of Occupation and Acquiescence Dependent on Express Agreement.—The difference in the lengths of periods of occupation required to establish a boundary is believed to be largely due to the proof on the one hand of an actual agreement, and on the other of mere assent and occupation, with no evidence whatever of an agreement. Greater lengths of time would naturally and reasonably be required to establish an agreement by evidence of occupation than if the agreement was proven independent of the occupation by a written instrument or by witnesses. Therefore a case where direct evidence or proof of assent is furnished would probably require less time to establish a boundary than where there was no agreement or assent proven, and more time than where a contract had been entered into. Such a rule would require three different periods to establish three different cases, with different facts and circumstances.

This is an unsatisfactory condition of the law and leaves the matter in a very unsettled condition. A New York judge concluded that "The better opinion is that the consideration mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry." The period as established in the older states is usually twenty or twenty-one years, but it varies in the different states, from only five in California to twenty-one in Pennsylvania. The period is usually the same as is required to acquire title to land, or the right to an easement, by adverse possession or by prescription.

The length of time which must elapse before an agreement fixing a division-line *can be inferred from acquiescence alone* is something about which there has been much speculation and controversy. No clear and distinct conclusion has been reached, but, as Judge Rhodes of California said in delivering the opinion of the court: "The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry" (twenty years usually).[3]

[1] Four-mile L. & C. Co. *v.* Gibson (Ky.), 49 S. W. Rep. 954 [1899].

[2] Van Der Groef *v.* Jones (Mich.), 65 N. W. Rep. 602.

[3] Jackson *v.* Ogden, 7 Johns. 238; Jackson *v.* Freer, 17 Johns. 29; McCormick *v.* Barnum, 10 Wend. 104; Dibble *v.* Rogers, 13 Wend. 536; Adams *v.* Rockwell, 16 Wend. 285; Van Wyck *v.* Wright, 18 Wend. 57; Boyd's Lessee *v.* Graves, 4

A Minnesota case makes one of three alternative conditions essential, viz.: where there is no doubt as to how premises shall be located according to certain and known boundaries described in a deed, in order to establish a practical location, different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be a location which has been acquiesced in for sufficient time to bar a right of entry under the statute of limitations; or the erroneous line must have been agreed upon between the parties claiming the land on both sides, and afterwards acquiesced in for a considerable time; or the party whose right is to be barred must have so conducted himself as to be estopped from ascertaining the true line.[1]

The decisions do not indicate in what way acquiescence by one adjoining proprietor in a division fixed by another adjoining proprietor is to be proven. It is clear that one mode of acquiescence is by actual occupation and cultivation up to such line so fixed without objection by the other adjoining owner. This is not the only mode by which this acquiescence can be shown. If it were, all these decisions and this controversy would be idle, for the party cultivating up to a line so fixed would acquire this land so claimed and cultivated by adverse possession. This acquiescence in a boundary-line which has been fixed and marked can be proved by any evidence that would satisfy a jury that such a division-line had been accepted by both parties; for example, by the cutting of timber habitually up to such division-line by one party with the knowledge of the other, who, knowing by these acts that the first party claims to this marked line as a division-line, makes no objection to such cutting.[2]

Mere occupancy of the land of another up to a fence which incloses it with the land of the occupant, believing such fence to be on the true boundary-line between the latter and the land of such other, without any claim of ownership up to the fence, or agreement that such fence or line should be the dividing-line, does not constitute adverse possession.[3]

However, when one has held possession of land for over twenty years, claiming up to a certain fence, which was supposed to be on the dividing-line, he acquires title by adverse possession even though he claimed to the fence only because he thought it was the true line.[4]

Proof that the adjoining owners established a dividing-line, as by the building of a wall or fence by both parties, may be good evidence of an agreement, and of adverse possession, which would change the rule.[5]

Wheat. 513. *And see* Jones *v.* Smith, 64 **N. Y.** 180 [1876]; Culbertson *v.* Duncan **(Pa.),** 13 Atl. Rep. 966 [1888], *twenty-one years;* Walker *v.* Simpson (Me.), 13 Atl. **Rep.** 580 [1888], *twenty years.*

[1] **Beardsley** *v.* Crane (Minn.), 54 N. W. **Rep.** 740.

[2] **W.** Va. Sup. Ct. App., June 26, 1889; **Riggs** *v.* Riley (Ind.), 15 N. E. Rep. 253 **[1888].**

[3] **McWilliams** *v.* Samuel (Mo.), 27 S. W. Rep. 550; Davis *v.* Caldwell (Ala.), 18 So. Rep. 103; Greer *v.* Powell (Ia.), 56 N. W. Rep. 440; Taylor *v.* Fomby (Ala.), 22 So. Rep. 910 [1897]; Rasdell *v.* Shumway (Kan. App.). 49 Pac. Rep. 631.

[4] Battner *v.* Baker (Mo.), 18 S. W. Rep. 911; Taylor *v.* Fomby (Ala.), 22 So. Rep. 910 [1897]. *See* Watrous *v.* Morrison (Fla.), 14 So. Rep. 805.

[5] Idaho Land Co. *v.* Parsons (Idaho), 31 Pac. Rep. 791; Pearson *v.* Dryden (Oreg.),

In conclusion it may be said that it is impossible to state just how many years of acquiescence in a dividing-line and occupation thereto are the least number that will establish that line irrevocably. It is unquestionably decided and settled that acquiescence and occupation for the full period established by the statute of limitations will fix the line, and preclude the owners from ever denying it afterwards. This is established by a long list of cases and has never been doubted.[1]

503. Occupation by License is Not Acquiescence or Proof of Agreement.—A privilege or license by the grantor of one adjoining owner to the other owner, when applied to on the subject of a division-fence, to "build the fence wherever he desired to build it" is not sufficient to establish the fence as a boundary when it appears by the evidence that the fence was not built on a certain line of stakes that the two owners had always recognized as the true dividing-line, and when it further appears that a surveyor had established the same line of stakes as the true line. It is not waived by a subsequent reference to arbitrators which results in a void award.[2]

However, where adjoining owners have adopted a division-line, and each has taken possession of his respective tract as of right, and one of them subsequently, claiming another line as correct, brings ejectment for the land included between the two lines, and defendant sets up adverse possession as a defense, it is error to instruct that adverse possession cannot be based on a possession having its inception in license.[3]

504. Acquiescence under a Mistake.—If a continuous and uninterrupted possession to the line of a division-fence under claim of ownership has been unintentional or under a mistaken belief that the fence was on the correct line, and without intention of claiming beyond the true line, then it will not give title nor bar the adjoining owner from demanding a correct location of the line.[4]* This principle is further stated in a case which held that "If one holds land up to a certain boundary as the true one, with the understanding, however, that he claims only to the extent of his paper title, he can never acquire any rights further than the line called for in his conveyance, no matter how long he may hold to that boundary; but if he claims absolutely and holds adversely to the line against all others, the line becomes so established after the statutory period of limitations, even though his claims are

43 Pac. Rep. 166; Whitcomb *v.* Dutton (Me.), 36 Atl. Rep. 67; Butler *v.* Drake (Minn.), 64 N. W. Rep. 559; Ramsey *v.* Ogden (Oreg.), 31 Pac. Rep. 778. *But see* Kurz *v.* Miller (Wis.), 62 N. W. Rep. 182.

[1] White *v.* Spreckles, 75 Cal. 610 [1888]; Sheldon *v.* Atkinson (Kan.), 16 Pac. Rep. 68 [1888]; Burris *v.* Fitch (Cal.), 18 Pac. Rep. 864 [1888], *sixteen years;* Dale *v.* Jackson, 8 N. Y. Supp. 715.

[2] Walker *v.* Simpson (Me.), 13 Atl. Rep. 580 [1888]. *See* Bloomington *v.* B. Cem. Ass'n (Ill.), 18 N. E. Rep. 298 [1889].

[3] Pearson *v.* Dryden (Oreg.), 43 Pac. Rep. 166; Idaho Ld. Co. *v.* Parsons (Idaho), 31 Pac. Rep. 791.

[4] E. Tenn. I. & C. Co. *v.* Ferguson (Tenn.), 35 S. W. Rep. 900; King *v.* Brigham (Oreg.), 31 Pac. Rep. 601; Skinker *v.* Hagsma (Mo.), 12 S. W. Rep. 659.

* *See* Sec. 498, *supra.*

based upon a mistake touching the survey."[1] It was so held when the claimant had stated, on several occasions after an erroneous survey had been made, that he did not claim more than the number of acres he had purchased.[2]

Where one of two adjoining landowners places a fence, without opposition from the other, on what is erroneously supposed by both to be the proper boundary-line, the other is not thereafter estopped to set up the error.[3]

If parties agree upon boundary-lines, and buildings or permanent improvements are erected to conform to those lines, they may not afterwards be changed to the prejudice and damage of either party.[4] This is under the doctrine of estoppel.*

[1] Mayor's Heirs *v.* Rice, 57 Mo. 485 [1874]. *Accord*, Smitzgabel *v.* Worseldine (Utah), 16 Pac. Rep. 400 [1888]; Scheible *v.* Hart (Ky.), 12 S. W. Rep. 628.

[2] Kahl *v.* Schmidt (Iowa), 78 N. W. Rep. 204 [1899].

[3] Golterman *v.* Schiermeier (Mo. Sup.), 28 S. W. Rep. 616; Roecker *v.* Haperla (Mo.), 39 S. W. Rep. 454; Rasdell *v.* Shumway (Kan.), 51 Pac. Rep. 285 [1897].

[4] *But see* City of Bloomington *v.* B. Cem. Ass'n (Ill.), 18 N. E. Rep. 298 [1889]; Graza *v.* Brown (Tex.), 11 S. W. Rep. 920; Mayor's Heirs *v.* Rice, 57 Mo. 485 [1874]; Idaho Ld. Co. *v.* Parsons (Idaho), 31 Pac. Rep 791.

* *See* Secs. 661–670, *infra.*

CHAPTER XXVIII.

ADVERSE POSSESSION. TITLE AND BOUNDARIES TO LAND AFFECTED BY IT.

511. Land Acquired and Boundaries Determined by Adverse Possession.—By early English law a person acquired by long use the right to hold and enjoy under two laws, the law of *prescription* and that of *limitations*. The right acquired by prescription was a positive right of ownership; the right given by the statute of limitations was a right to be let alone in the quiet possession of land so acquired. The latter barred the previous owner from asserting his rights or maintaining any suit for the recovery of his land. In this country there is little if any difference between the two as regards real property. The same period is required by both, and the way consistently and logically to apply the law is to give the possessor title to the land as owner after an adverse user for the statutory period.[1]

512. Surveyor should Take Cognizance of his Client's Rights.—To render good service to his client a surveyor will not merely discover and locate the paper title to an estate, but will include all that legally and properly belongs to it. If, in making the survey by the description in the conveyance, he finds an existing line that differs from his line and includes more than is called for by the paper titles, he should make inquiries whether a division-line has ever been mutually agreed upon and established by the parties or their grantors; whether the line has ever been submitted to arbitration and thus determined, and how long it has existed in its present state. Answers to these inquiries will enable him to make a complete report and thus to put on record facts and evidence that may prove valuable to the proprietor in years to come.

The subjects of "Agreements and Acquiescence as to Boundaries" and "Arbitration of Boundaries" have already been considered.

In determining the boundary-lines of land over which a proprietor may assert ownership and maintain possession, a surveyor's first duty is to consult the records, or to call for copies of the title-deeds, which the owner generally has in his possession and under which he claims. These usually contain descriptions by boundaries (fixed monuments, courses, and distances) which

[1] Langdell's Eq. Pleading, §§ 119–127.

are sufficient to establish the precise boundary-lines of the estate. While these may be sufficient to locate and inclose the land claimed under the deed or by the grant or devise, yet other lands may be owned which may rightfully and properly be included in the survey.

It has been shown how one owning lands bounded upon streams and bodies of water may acquire lands by accretion, and that these should be included in the survey of a man's estate. It is now proposed to explain other conditions and circumstances, the long-continued existence of which will enable a person to acquire title to land formerly held and claimed by others. Such land if it has certainly become the property of the proprietor should be included in the survey and included as part of the estate, and a surveyor should know with some reasonable degree of certainty what can be claimed and what may not be included. To understand this fully he must know some of the reasons for this peculiar phase of the law which permits one man to lay claim to, and eventually acquire, title to another man's lands.

513. Brief History of Rights by Adverse Possession.—The law governing adverse claims to land is the result of a desire on the part of the members of civilized society to secure their estates to themselves, free from vexatious suits and controversies; to insure themselves the quiet and peaceful enjoyment of their possessions, and to bury litigation in the grave of the past. The present law is not the result of a first attempt, but is the outcome of a number of legislative acts. Its history begins in 1275, when an act was passed which limited suits for possession of land to claims acquired since 1189, the time of Richard I. Any man who had held possession since 1189 had the title to the land. In 1540 a statute was passed which forbade any suit or claim to land not held within sixty years by the party himself, his grantor or predecessor under whom he claimed. This statute was followed in 1623 by another which reduced the statutory period to twenty years, which statute denies any person who may have had right and title to land to enter after the lapse of twenty years after the right accrued to him. It requires him to bring any suit or action at law to recover the land within twenty years after the title descended to him or cause of action accrued, and precludes him from bringing any action at any time after twenty years. This period has been retained by many of the older states of this country, and substantially the same or similar statutes have been enacted. In the Western and Southern states the period varies from five to twenty-one years.

514. Possession as Evidence of Title.—Possession itself is a species of title, of lower grade it is true, yet it is good as against all who cannot show a better title, and by lapse of time may become, under the statute of limitations, perfect and indefeasible.[1] This possession when under a claim of ownership is called adverse possession, and when open, adverse, and uninterrupted for the period fixed by statute gives to the owner so claiming and holding an

[1] McNeely *v.* Langan, 22 Ohio St. 32.

indisputable ownership of the land so held and claimed. The claim of ownership must be open, notorious, and for the entire period; it may not be quiet, in secret, or relinquished for a single moment during the whole time. Possession, ordinary acts asserting ownership, such as cultivation, occupation, and use, are sufficient to show a claim of ownership. The possession must be open and notorious and not by stealth; it must be adverse to everybody; it must be exclusive and uninterrupted. When such a possession has continued for the period established by statute (twenty years in many states) it establishes a complete title to the lands in the one who has had possession, which title cannot be reconveyed, abandoned, or relinquished to the former owner except by a deed, duly attested, acknowledged, and recorded, as required by law in ordinary conveyances of title.[1] After the lapse of the statutory period the adverse possession ripens into a title, and this cannot be waived by an agreement. It gives a perfect title, one that will satisfy a guarantee of a perfect title.[2]

The law giving a person title to land after possession for a certain number of years is a statutory law, and every engineer or surveyor must make himself acquainted with the peculiarities of the law of his own state. They do not differ much in general principle. All are modifications of the English statutes or of those of the older states which have themselves been framed after the English laws. The chief differences are in the periods required, and in the disabilities which are permitted to prevent the operation of the law. It is only intended to give here the general principles of the law as found laid down in the decisions of the courts, leaving it imperative that every engineer or surveyor must read the statutes of the state in which he proposes to practice his profession. What constitutes adverse possession is a question of law and for the court to say; whether the facts and circumstances attending any particular case are sufficient to make a possession adverse is a question for a jury under proper instructions by the court.

515. Essential Elements of Adverse Possession to Give Title.—Adverse possession must consist of six elements, or coexisting circumstances, viz.: (1) it must be adverse and hostile; (2) it must be actual; (3) it must be visible, open, and notorious; (4) it must be exclusive; (5) it must be continuous and uninterrupted; (6) it must be under claim or color of title or right.

516. Possession must be Adverse and Hostile. — By "adverse and hostile" is understood that the possession must not be by permission, license, or agreement of the owner. The possession of a tenant, a licensee, or one who enters land under contract of sale is not adverse or hostile to the landlord or licensor. It is not necessary that the party personally occupy the

[1] School Dist. *v.* Benson, 31 Me. 381. *See also* Armstrong *v.* Ristian, 5 Md. 256; Schall *v.* Wins. R. R., 35 Pa. St. 191; Jones *v.* Hughes (Pa.), 16 Atl. Rep. 849 [1889].

[2] Hughes *v.* Graves, 39 Vt. 359; Faloon *v.* Simshauer (Ill.), 22 N. E. Rep. 835.

land. The possession may be by or through the party's agent, steward, or tenant, or under a contract of purchase. However, the party should have taken and at some time have had actual possession,[1] except, it seems, in case of a trust deed.[2]

No length of possession by those who hold by permission of the owner will cause limitations to run against the title of the owner;[3] but consent of the owner of land to its occupancy by another does not of itself prevent such occupancy from being adverse, if the other essentials of an adverse holding appear.[4]

A tenant or subtenant must terminate his tenancy with, or surrender his lease to, the legal owner; to whom also he must declare his adverse possession or claim. A denial of the title of his landlord at the expiration of his lease,[5] a purchase of a tax-title[6] and a claim of ownership under it, a surrender of possession and subsequent taking adversely,[7] will set the statute running and form an adverse possession.

A mere holding over after the lease has expired is not adverse;[8] but a disclaimer and notice to the owner after the term has expired will set up adverse title without surrendering the possession of the premises,[9] and notice of such adverse holding need not be shown by evidence so convincing as to preclude all doubt.[10] In California a tenant who holds under one who is not the real owner will hold adversely to the real owner without a surrender to his landlord and a reentry.[11]

Generally possession will have to be surrendered unless the disclaimer is equivalent to a surrender, or is so apparent that there can be no doubt of the tenant's hostile claims.[12]

What has been said of tenants may in general be said of a licensee,[13] or of a trustee,[14] or of tenants in common,[15] or of a life-tenant as against the

[1] Wiggins *v.* Kirby (Ala.), 17 So. Rep. 354; Parks *v.* Barnett (Ala.), 16 So. Rep. 136.

[2] Ivy *v.* Yancey (Mo.), 31 S. W. Rep. 937.

[3] Long *v.* Hall (Tenn.), 46 S. W. Rep. 343 [1898], Harrison *v.* Caswell (Sup.), 45 N. Y. Supp. 560.

[4] Murphy *v.* Reynaud (Tex. Civ. App.), 21 S. W. Rep. 991.

[5] Catalino *v.* Decker, 38 Conn. 362; Butler *v.* Bertrand (Mich.), 56 N. W. Rep. 342, *a subtenant;* Wilkins *v.* Pensacola City Co. (Fla.), 18 So. Rep. 20.

[6] Weichselbaum *v.* Curlett, 20 Kan. 709.

[7] 1 Amer. & Eng. Ency. Law 240.

[8] Learned *v.* Talmadge, 26 Barb. (N. Y.) 444; Shields *v.* Horbach (Neb.), 68 N. W. Rep. 524.

[9] Vass *v.* King (W. Va.), 10 S. E. Rep. 402; Shields *v.* Horbach (Neb.), 68 N. W. Rep. 524.

[10] Reusens *v.* Lawson (Va.), 21 S. E. Rep. 347.

[11] Millett *v.* Lagomarsino (Cal.), 40 Pac. Rep. 25.

[12] Bedlow *v.* New York Dry-dock Co. (N. Y.), 19 N. E. Rep. 800 [1889]; Vosen *v.* Dantel (Mo.), 22 S. W. Rep. 734; Whitney *v.* Edmunds, 94 N. Y. 309 [1884].

[13] Haggard *v.* Martin (Tex. Civ. App.), 34 S. W. Rep. 660; Downing *v.* Dinwiddie (Mo. Sup.), 33 S. W. Rep. 470; Coleman *v.* Pickett (Sup.), 31 N. Y. Supp. 480; Jacob Tome Inst. *v.* Crothers (Md.), 40 Atl Rep. 261 [1898].

[14] Gardner *v.* Holland (S. C.), 19 S. E. Rep. 997; Kansas C. Inv. Co. *v.* Fulton (Kans. App.), 46 Pac. Rep. 188; Meacham *v.* Bunting (Ill.), 41 N. E. Rep. 175; Cameron *v.* Chicago, M. & St. P. Ry. Co. (Minn.), 61 N. W. Rep. 814.

[15] Garcia *v.* Illig (Tex.), 37 S. W. Rep. 471; Mahill *v.* Torrence, 163 Ill. 277; Pierson *v.* Conley (Mich.), 55 N. W. Rep. 387.

remainderman entitled to a reversion.[1]

If, however, a trustee holding title to land for the use of one during life, with remainder to others, to be ascertained at the termination of the life-estate, allows a prescriptive title to ripen against him during the life-estate, the remaindermen are also barred.[2] When the lessee or tenant has held under a void lease it seems that his holding is adverse.[3] In the state of New York by statute a tenant's possession does not become adverse until twenty years after he has ceased to pay rent or after the lease has expired.

One who enters into possession under contract of sale cannot be adverse unless his hostility has been manifest by pronounced acts brought expressly, or by legal implication, to the vendor's notice.[4] A purchaser of land under a parol contract who has paid only part of the purchase-price and who was put in possession by vendor does not hold adversely.[5] Possession becomes adverse on compliance by the purchaser with all conditions,[6] including the payment of the purchase-price.[7] However, it seems that the possession of the purchaser is not the possession of the vendor, so that a subsequent purchaser can have the benefit of the time during which the earlier purchaser held. The possession by the vendor was held subordinate and not adverse to the purchaser.[8]

Possession by either husband or wife under a void deed of the land occupied is not adverse one to the other if they are living in marital relations. But if the wife die[9] or separate from the husband, then it seems adverse possession begins.[10]

Where a grantee in a deed erases his name and inserts that of his wife, with intent to vest title in her, and she holds the land as owner thereof, the statute of limitations begins to run in her favor during the life of her husband, and continues uninterrupted by his death.[11]

As between parties sustaining parental and filial relations, the possession of land of the one by the other is presumed to be permissive and not adverse, and to overcome such presumption there must be some open assertion of hostile title other than mere possession, and knowledge thereof brought home to the owner.[12] The possession of land acquired by a father under a conveyance made to his infant daughter by her grandfather, and delivered to such

[1] Austin *v.* Brown (W. Va.), 17 S. E. Rep. 207.

[2] Cushman *v.* Coleman (Ga.), 19 S. E. Rep. 46.

[3] Jones *v.* Madison County (Miss.), 8 So. Rep. 87.

[4] Kerns *v.* Dean (Cal.), 19 Pac. Rep. 817 [1889]; Spratt *v.* Livingston (Fla.), 14 So. Rep. 160; Roe *v.* Bundy's Heirs (La.), 12 So. Rep. 759; Clark *v.* Comford (La.), 12 So. Rep. 763.

[5] Gamble *v.* Hamilton (Fla.), 12 So. Rep. 229; Bird *v.* N. J. & N.Y. R. (Sup.), 38 N. Y. Supp. 281.

[6] Doe *v.* Roe (Del. Super.), 32 Atl. Rep. 391, 7 Houst 386.

[7] Ward *v.* Cochran (C. C. A.), 71 Fed. Rep. 127.

[8] Jaff. Ry. Co. *v.* Ogler, 82 Ind. 394; McCormack *v.* Silsby (Cal.), 22 Pac. Rep. 874.

[9] Berkowitz *v.* Brown, 23 N. Y. Supp. 792.

[10] Warr *v.* Honeck (Utah), 29 Pac. Rep. 1117. *See* 1 Amer. & Eng. Ency. Law 250.

[11] Massey *v.* Rimmer, 69 Miss. 667.

[12] O'Boyle *v.* McHugh (Minn.), 69 N.W. Rep. 37.

father, can never ripen into a title by prescription; and if he conceals the facts from her, he cannot obtain title by adverse possession, although for twenty years after she became of age he retained the land and rented it to her.[1]

Where the children of a decedent take possession of his land, their holding is adverse to persons who claim to be his children by another woman, his lawful wife, and that those in possession are illegitimate.[2] A holding by right of dower is not adverse.[3]

517. Adverse and Hostile Character of Possession a Question of Intention.—This element of hostility to the true owner is an indispensable element of adverse possession. It must be continuous and notorious, and cannot be inferred, as the presumption is in favor of the true owner. If lands are inclosed by mistake and claimed by the party as his own, it will work a disseisin; but if a fence is built for the purpose of husbandry and with no intention of building it on the true dividing-line, and no claim is made to the land to the fence, but only to the true line, wherever that may be, to be subsequently ascertained, this possession is *not* adverse. The question is, did the party claim to the fence or did he not?—a question of *intent*.

This inquiry into the intention of parties is a matter for the jury, and one burdened with difficulties. The natural selfishness of mankind prompts a man to say that of course he claimed to the fence, if by so swearing (doing) he can hold that which he otherwise would lose. There are strong opinions and decisions that it is only necessary for a person to enter and take possession as his own, to take rents and profits to himself, and to manage the property as an owner would manage his own, as if he were the true owner and accountable to no person.

The motives of the possessor cannot be inquired into; whether he intends a wrongful disseisin or whether he occupies what he sincerely believes to be his own, a possession for the statutory period gives him title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry will be made. It is the visible and the adverse possession with an intention to possess that constitutes its adverse character, and not the remote views or belief of the possessor.[4] The intention to claim adversely is an essential ingredient. It matters not that the possessor was mistaken, and that had he been better informed he would not have entered on the land. If by mistake he has inclosed the land of another and claimed it as his own to certain fixed monuments or boundaries, his actual and uninterrupted posses-

[1] **Parker** *v.* Salmons (Ga.), 28 S. E. Rep. 681 [1897]; Lawrence *v.* Lawrence (Oreg.), 12 Pac. Rep. 186; Jester *v.* Francis (Tex.), 31 S. W. Rep. 245.

[2] **Westenfelder** *v.* Green (Oreg.), 34 Pac. Rep. 23.

[3] **Robinson** *v.* Allison (Ala.), 12 So. Rep. 382; Westenfelder *v.* Green (C. C.), 76 Fed. Rep. 925. *See, contra*, Edwards *v.* Humphreys (Tex.), 36 S. W. Rep. 333, *and* Eldridge *v.* Parish (Tex.), 25 S. W. Rep. 49, *a homestead*.

[4] Humphreys *v.* Hoffman, 33 Ohio 395; French *v.* Pearce, 8 Conn. 430.

sion as owner for the statutory period will work a disseisin, and his title will be perfect.[1]

It is impossible to explain the invisible motives of the mind, or to inquire whether the possessor of land acted under his best knowledge and belief. If one take possession of land and retain it under claim of ownership, it does not matter whether in conscience he believes he was taking it wrongfully or rightfully; the question is, has he possessed for the period required, uninterruptedly and exclusively, under a claim and belief of right, and has he appropriated to his own use, without account, the rents and profits?

An essential ingredient is the claim of right hostile to the owner. The *quo animo* (intention) with which the possession was taken and held is the test. An inquiry as to the intention of the possessor is therefore essential, in order to determine the nature of his possession. The adverse possession must be strictly proved, it will not be presumed. The presumption is in favor of the owner, that he holds possession under the regular legal title.

Where one goes into a house, knowing that no one is looking after the rent thereof, with the intention of keeping it so long as he can do so without paying rent, his possession is not adverse.[2] If he does not intend to claim as his own a small tract of land included within the inclosure, his possession is not adverse.[3]

What will prove an intention to possess adversely, under claim of right, is a question about which much controversy exists. Whether mere possession is sufficient to assert the claim of right, or whether there must be other acts and declarations, is not perfectly settled. The doctrine that exclusive possession, occupation, cultivation, etc., under belief that the premises are rightfully possessed, are not sufficient unless accompanied by a claim of title to the premises, has prevailed in some states. They maintain that belief alone is not sufficient, but that the claim of right, asserted and demanded, is indispensable.

Land held under a mistake as to description is held adversely, and such holding gives title by limitation.[4] The element of intention is important, and at the same time one almost impossible to ascertain.

Although the cases setting forth this doctrine have not as yet been overruled in their respective states, subsequent decisions in Maine, Alabama, and Missouri seem to have left but little authority in them except in the local jurisdiction where they were decided.[5] The decisions stand and should have some consideration in Iowa, Vermont, Alabama, Maine, Missouri, and Georgia.

[1] Levy *v.* Verga, 25 Neb. 764; Obernalta *v.* Edgar, 44 N. W. Rep. 82; 41 N. W. Rep. 773.

[2] Smeberg *v.* Cunningham (Mich.), 56 N. W. Rep. 73.

[3] Pharis *v.* Jones (Mo. Sup.), 26 S. W. 1032.

[4] 1 Amer. & Eng. Ency. Law 282.

[5] Gray's Real Property Cases 85, 86.

518. Possession Held under a Mistake may be Adverse and Hostile—Color of Title.—The rule seems to be general that if a person enters upon land under some show or pretense of title, called "color of title," and takes possession of lands not embraced therein, with the intention of possessing the whole, he is treated as being in possession of the whole; but if it were his intention to possess a part only, and his actual possession is confined to that part, then he cannot claim the whole. This rule is not universally followed, and in Mississippi it was held that possession by an adjoining owner, without any intention of claiming any more than what belonged to him, was adverse and gave title.[1]

A mistake in the description does not prevent the grantee from acquiring title by adverse possession.[2] A mistake, either in the deed or in taking of possession, by which the occupant had possession of the wrong lot, will not deprive him of title acquired by limitation.[3] If, however, the entry is by mistake upon land not covered by his title, he acquires possession only of what he actually occupies.[4]

If a line has been erroneously run, and the parties, ignorant of the mistake, occupy according to it for the statutory period, believing and relying upon it as the true boundary, it cannot afterwards be changed or disturbed. The title thus acquired cannot be transferred by a mere oral agreement to run a new line.[5] If the parties did not rely upon the first survey, but intended or expected to make a subsequent survey to settle the division-line, then the possession will not give title. The question of what were the parties' intentions, their claims, and the nature of their possession, is a question for the jury exclusively.[6]

A purchaser whose lot was described as sixty feet frontage, but who took possession of sixty-six feet to a fence, under belief that his lot ran to the fence, and actually occupied to the fence for the full period required to give title, was held to have absolute title even though he was mistaken.[7] If, however, such a mistake is made by inadvertence or ignorance of the true line, and with no intention to claim any portion of the adjoining lot, it is not adverse.[8]

An agreement that one of two adjoining owners should keep up a division-fence, but should keep it entirely within his own bounds, will not preclude the one erecting the fence from claiming to the original boundary; the agree-

[1] Metcalf *v.* McCutchen, 60 Miss. 145. *But see* Grube *v.* Wells, 34 Iowa 148; Napier *v.* Simpson, 1 Tenn. 453.

[2] Bean *v.* Bachelder, 74 Me. 202; Souder *v.* Jeffries, 8 N. E. Rep. 288.

[3] Richer *v.* Hubbard, 73 Me. 105; Canfield *v.* Clark (Oreg.), 21 Pac. Rep. 443 [1889].

[4] Napier *v* Simpson, 1 Tenn. 453; St. L. University *v.* McCune, 28 Mo. 481; Holton *v.* Whitney, 30 Vt. 410.

[5] Beckman *v.* Davidson (Mass.), 39 N. E. Rep. 38.

[6] Yetzer *v.* Thoman, 17 Ohio St. 130.

[7] Hitchins *v.* Morrison, 72 Me. 331.

[8] Riley *v.* Griffin, 16 Ga. 141; Brown *v.* Gray, 3 Greenl. (Me.) 126; Walbrun *v.* Ballen, 68 Mo. 164; Winn *v.* Abeles, 35 Kan. 85; Thomas *v.* Babb, 45 Mo. 384; Farish *v.* Coon, 40 Cal. 33; Abbott *v.* Abbott, 51 Me. 575; St. Louis University *v.* McCune, 28 Mo. 481.

ment having recognized that the fence was not on the true line, and the agreement not being good as a conveyance or color of title.[1]

The question is, has the occupant claimed title to the land in his possession, or has he believed that the land belongs to him? If he has, then the fact that he has been mistaken will not prevent his holding adversely.[2] It should be occupied under color of title. A lost deed, an unrecorded deed, a void tax-deed, may each constitute color of title.

It appears that if one deliberately take possession of land, or if he intentionally encroach his fence beyond his true line, or if he build his building knowing it to be upon the land of his neighbor, then he will acquire a good title to the property so occupied; but if he be conscientious and honest, intending only to take what properly belongs to him, then he gets only what is clearly his, no matter how long he has had possession. It must be conceded that this is unfortunate law, and a strong bid for dishonesty, that the court itself holds out to its subjects.

519. Possession by Agreement and Acquiescence is Adverse.—It must follow that if two adjoining owners agree upon and establish a dividing-line between their estates, and occupy according to that line, it will preclude them from ever denying it to be the true line after such continued possession for the statutory period.[3] The maintenance of a division-fence, each keeping up one-half, and occupation to the fence each on his own side, is sufficient to submit the question of an adverse possession to the jury.[4] An agreement may be inferred after long acquiescence, and, as before stated, in some states the long acquiescence need not be for the full statutory period required to give title by adverse possession.[5]* If the boundaries are indefinite and cannot be ascertained, and a division-line is agreed upon as the boundary-line, the line thus established will control their deeds and should be taken as the true line.[6]†

520. The Possession must be Actual.—By "actual" possession is meant an actual entry, a foothold upon the land, a possession in fact, a standing upon it, an occupation of it as a real demonstrative act done. It should be accompanied with the real and effectual enjoyment of the estate, with the occupation of its fruits and profits. Such actual possession is usually evidenced by occupation, by a substantial inclosure, by cultivation and appropriate use according to the customs of the locality. What is necessary to constitute an actual possession may vary in different jurisdictions and is frequently

[1] White *v.* Hapeman, 43 Mich. 267; Hagey *v.* Detweiler, 35 Pa. St. 409; Hitchins *v.* Morrison, 72 Me. 331; Ricker *v.* Hubbard, 73 Me. 105; Brown *v.* Cockerel, 33 Ala. 38; Enfield *v.* Day, 7 N. H. 459.

[2] 1 Amer. & Eng. Ency. Law 283.

[3] 1 Amer. & Eng. Ency. Law 249, *and cases cited*; Bader *v.* Zeise, 44 Wis. Tobey *v.* Secor, 60 Wis. 310, 500.

[4] Jones *v.* Smith, 64 N. Y. 180.

[5] 1 Amer. & Eng. Ency. Law 250.

[6] *See* Tyler on Boundaries 335–337.

* *See* Secs. 500–503, *supra*.

† *See* Secs. 491–510, *supra*.

defined in the statutes of the states. Occupation, residence, inclosure, cultivation, and improvement suitable to the character of the land are all acts evidencing an actual possession.

It is evident that the same rule cannot be applied equally to all tracts. An actual possession of wild lands, of a farm, or of a city lot must essentially be of different character; and what constitutes an actual possession must be governed by the facts of each case. It is not necessary that the land be fenced or otherwise inclosed; cutting of grass and of timber to a definite line, the cultivation of the soil, and similar improvements and evidence of ownership will extend the possession to the portion actually cut over or cultivated.

The jury may take into consideration the nature of the land,[1] and neither actual possession, cultivation, nor residence is necessary when the property is put to the use for which it is suited and the only use of which it is susceptible.[2] Whether a party claiming title by adverse user has such continuous, notorious, and hostile possession as would give him title under the statute of limitation is a question for the jury.[3]

521. What Constitutes Adverse Use.—An occasional use of the land, to cut grass,[4] firewood or timber, or for stripping bark[5] or taking stone, or for pasturage and cutting hay,[6] though accompanied with the payment of taxes,[7] will not constitute adverse possession.

When lands are partly or periodically submerged, the occasional digging and hauling of sand,[8] or of muck and stones,[9] the erection of temporary structures,[10] mere fugitive, disconnected trespasses, however long continued, will not give title.[11]

Payment of taxes, cutting timber, and grazing and watering one's cattle on 160 acres of unfenced pasture and timber lands, capable of being inclosed, and a part of which was suitable for cultivation, and the burning of a limekiln on the land, do not constitute adverse possession.[12]

If the land be not fit for any immediate or permanent improvement, actual occupancy, cultivation, or residence may not be necessary.[13] The occupation of pine land by annually making turpentine from the trees[14] has been held

[1] Gayner *v.* Hall, 60 Mo. 271.
[2] Dorr *v.* School Dist., 40 Ark. 237.
[3] Mason *v.* Ammon (Pa.), 11 Atl. Rep. 449 [1888].
[4] Sage *v.* Larson (Minn.), 71 N. W. Rep. 923.
[5] Lantry *v.* Parker (Neb.), 55 N. W. Rep. 962; Taylor *v.* Slingerland (Minn.), 40 N. W. Rep. 575; Soape *v.* Doss (Tex.), 45 S. W. Rep. 387; Ohio & B. S. R. Co. *v.* Wooten (Ky.), 46 S. W. Rep. 681; Harms *v.* Kranz (Ill.), 47 N. E. Rep. 746.
[6] Sage *v.* Larson (Minn.), 71 N. W. Rep. 923; Vineyard *v.* Brundrett (Tex.), 42 S. W. Rep. 232.
[7] Herbst *v.* Merrifield (Mo.), 34 S. W. Rep. 571.
[8] Strange *v.* Spaulding (Ky.), 29 S. W. Rep. 137.
[9] Linen *v.* Maxwell (N. H.), 40 Atl. Rep. 184 [1893].
[10] Fuller *v.* Dauphin (Ill.), 16 N. E. Rep. 917 [1888]; Dubuque *v.* Coman, 64 Conn. 475.
[11] Strong *v.* Powell (Ga.), 20 S. E. Rep. 6. *But see* Fin *v.* Wis. Land Co. (Wis.), 40 N. W. Rep. 209; Mission *v.* Cronin (N. Y. App.), 38 N. E. Rep. 964; Judson *v.* Duffy (Mich.), 55 N. W. Rep. 837.
[12] Nye *v.* Alfter (Mo. Sup.), 30 S. W. Rep. 186.
[13] Leeper *v.* Baker, 68 Mo. 400, 407; Washburn *v.* Cutler, 17 Minn. 361.
[14] Bynum *v.* Carter, 4 Ired. (N. C.) 310.

a sufficient adverse possession.[1]

The use of a pond for canal and mill purposes, flowing and emptying at convenience, using soil from the bottom to repair a dam, and exercising such general acts, constituted an actual possession that in time would give title to the land under the pond;[2] but the mere cultivation of land upon which the owner of a mill-dam has the right to back water is not an act of possession adverse to such owner.[3]

Adverse possession of unproductive lands, consisting of barren sand-hills cut up by sloughs, is *shown* by recording the deed, cutting all the timber of any value thereon, having the land surveyed and boundary-lines grubbed out and staked, going upon the land at intervals, claiming absolute ownership, clearing a small portion, building a brush fence around the portion cleared, employing agents in the neighborhood of the land to look after it, and paying taxes, without proof of actual occupation.[4]

Adverse possession was held not shown where the purchaser of land in Texas which was covered with timber, and suitable for a stock-ranch, erected a house suitable for ranching purposes and two stock-pens, and carried a stock of cattle to the premises, and turned them loose on the range, going on the land from time to time to mark and sell the stock, at such times occupying the house for less than two weeks, but never for more than four months in a year. There was some furniture in the house, and, when not occupied, it was locked, and defendant's son carried the key.[5]

Peaceful possession and proof that claimant paid the taxes, cut valuable timber, erected shanties, burned charcoal, cleared and cultivated portions, run lines, made roads, and prevented trespass, will establish title by limitation.[6]

Evidence that plaintiff surveyed the land when he purchased it, visited it thereafter nearly every Sunday, pastured horses on it, set out trees, dug a well, dictated the erection of a small house, and every year for twenty years mowed the land or let it out to mow, is sufficient to sustain a verdict that he had been in actual, open, visible, notorious, exclusive, uninterrupted, and adverse possession of the land for twenty years.[7]

Evidence that defendants and their predecessors claimed to be the owners, and exercised acts of ownership by driving stakes to mark boundaries, by fishing, hunting, and trapping, by leasing to others, by the erection of signs warning off trespassers, and by building a dike around the land, is sufficient to establish adverse possession.[8]

[1] Flannery *v.* Hightower (Ga.), 25 S. E. Rep. 371.

[2] Eastern R. *v.* Allen, 135 Mass. 13.

[3] State *v.* Suttle (N. C.), 20 S. E. Rep. 725.

[4] Worthley *v.* Burbanks (Ind. Sup.), 45 N. E. Rep. 779. *Accord*, Guinn *v.* Spillman (Kan.), 35 Pac. Rep. 13; Moore *v.* Hinkle (Ind.), 50 N. E. Rep. 822 [1898].

[5] Pendleton *v.* Snyder (Tex.), 24 S. W. Rep. 363.

[6] Deer Lake Co. *v.* Mich. L. & I. Co. (Mich.), 50 N. W. Rep. 807.

[7] Sullivan *v.* Eddy (Ill. Sup.), 45 N. E. Rep. 837; Winnipisiogee Paper Co. *v.* N. H. Land Co. (C. C.), 59 Fed. Rep. 542.

[8] Chabert *v.* Russell (Mich.), 67 N. W. Rep. 902.

It is sufficient that the occupant went into occupation under a claim of ownership, erected buildings thereon, and defined the boundaries thereof by plowing furrows around them, according to the custom in the neighborhood, and afterwards remained in possession with the lands so inclosed.[1]

Occupying a place from year to year, in the spring, to make sugar from the trees upon a tract of land; having a woodpile and burying potatoes in the ground; digging sand from time to time, are regarded as mere acts of trespass if done in a settled country.[2] One can scarcely distinguish between making sugar from a maple orchard, and turpentine from a pine forest; but the one act committed in a settled community in Vermont might not be an adverse possession, while if committed on wild lands in North Carolina, whose only use was that of making turpentine, it would constitute an actual possession.[3] Surveying of the land and paying taxes will not constitute actual possession in New York.[4] Going upon the wild land, digging and hunting for a corner and boundary-lines, driving cattle thereon and employing a man to plow in the following spring, are not such acts as alone will create title by adverse possession.[5] Acts of ownership in a highway, such as cutting grass, setting out shade-trees, building a sidewalk, and piling lumber and stones in the highway against the fence, do not establish a claim by adverse possession.[6] Possession of an unfenced lot for the purpose of marble- and stone-cutting, involving the scattering of stone all over the lot, is sufficient.[7]

If used in the manner adapted to the condition and location of the land, a residence thereon is not essential.[8] The land must be used in the ordinary way, be put to the same uses, and employed in the same manner and for the same purposes as other property in the locality.[9] If its character or location be such as does not permit of improvements of a permanent character, then such improvements will not be necessary to adverse possession. If it is not fit for residence, or its soil is not susceptible of cultivation, then the occupation will be regulated accordingly.[10] If an adverse owner claims cultivation as an evidence of his claims, his cultivation must be such as is usual in the neighborhood, it must be continuous and not merely an occasional negligent effort.[11] It is not necessary that uninclosed and uncultivated land be inclosed and cultivated merely because it can be.[12] It is quite essential that the nature

[1] Sage *v.* Morosick (Minn.), 71 N. W. Rep. 930.

[2] Wilson *v.* Blake, 53 Vt. 305.

[3] Bynum *v.* Carter, 4 Ired. (N. C.) 310.

[4] Douglass *v.* Irvine, 126 Pa. St. 643 [1889]; Thompson *v.* Burhans, 61 N. Y. 70.

[5] Brown *v.* Rose, 55 Iowa 734; Morris *v.* Callanan, 105 Mass. 129; Wheeler *v.* Winn. 53 Pa. St. 122; Thompson *v.* Burhans, 61 N. Y. 52; Overton *v.* Davisson, 1 Gratt. 211.

[6] Bliss *v.* Johnson, 94 N. Y. 235 [1883].

[7] Holtzman *v.* Douglas, 18 Sup. Ct. Rep. 65, 168 U. S. 278.

[8] Anderson *v.* Burnham (Kan.), 34 Pac. Rep. 1056.

[9] Booth *v.* Small, 25 Iowa 177; Backus *v.* Burke (Minn.), 65 N. W. Rep. 459; Hook *v.* Joyce (Ky), 22 S.W. Rep. 651, *a burial-lot;* Sadtler *v.* The Peabody Co., 66 Md. 1 [1886].

[10] Clancy *v.* Hondlett, 39 Me. 451; 1 Amer. & Eng. Ency. Law 255.

[11] 1 Amer. and Eng. Ency. Law 259.

[12] Goodson *v.* Brothers (Ala.), 20 So. Rep. 443.

of the land be shown.[1]

The possession must be confined to one spot during the whole period prescribed by statute, and must not be a roving possession from one part to another of the land, which has not been held adversely for the full period. The different periods of possession of the separate parcels cannot be united to make the number of years required.[2]

522. Land should be Inclosed.—If the property is used openly and exclusively for the purposes for which it is ordinarily fit or adapted, accompanied with a claim of ownership, no fence or other artificial boundary is necessary to indicate the limits;[3] but if the occupant relies on inclosures, they must be substantial and their nature be governed by the lands inclosed. A mere brush fence, or one made by failing and lopping trees, has been held to be insufficient.[4] A log boom built by driving piles and connecting them by boom-sticks, completely surrounding a tract of submerged land, has been held a sufficient inclosure of the land.[5]

The land claimed should be inclosed on all sides. Two sides fenced, a highway on the third, and marked trees on the fourth side has been held to be insufficient.[6] A lot fenced on three sides was held not to be inclosed, to give adverse possession. The fence must be erected by the party claiming, and for the purpose of marking the boundaries, though the fence of an adjoining owner, if on the boundary-line claimed to, may suffice.[7] A lot fenced on three sides and bounded by a stream (river) is inclosed.[8] If the adjoining tract of property be owned by the party making the adverse claim, and the two parcels are fenced together, then there is no necessity for maintaining a fence between them.[9] Temporary breaks in a fence or an inclosure will not interrupt the adverse possession;[10] neither will breaks caused by a flood.[11] If the fence be built to water's edge of navigable waters, it need not be extended as the waters recede to give title to accretions.[12] The fences should be maintained.[13] If a fence cannot be maintained owing to violent waters or shifting sands, it will be sufficient if the plat of land be marked by monuments.[14]

Natural boundaries will answer the purpose if of a definite and substantial character. Whether they are so or not is a question for the jury under proper

[1] Goff *v.* Cole (Miss.), 13 So. Rep. 870.
[2] Potts *v.* Gilbert, 3 Wash. C. C. 475. Griffith *v.* Schwenderman, 27 Mo. 412; 1 Amer. & Eng. Ency. Law (2d ed.) 835.
[3] Zeilin *v.* Rogers, 21 Fed. Rep. 103.
[4] Sharrock *v.* Ritter (Tex.), 45 S. W. Rep. 156 [1898]; Vineyard *v.* Brundrett (Tex.), 42 S. W. Rep. 232.
[5] Allen *v.* McKay (Cal.), 52 Pac. Rep. 828, 120 Cal. 332 [1898].
[6] Parkersburg Ind. Co. *v.* Schultz (W. Va.), 27 S. E. Rep. 255.
[7] 1 Amer. & Eng. Ency. Law 260.
[8] Sanders *v.* Riedinger (Sup.), 43 N. Y. Supp. 127; s. c., 51 N. Y. Supp. 937 [1898].
[9] Sanders *v.* Riedinger, 51 N. Y. Supp. 937.
[10] Sharrock *v.* Ritter (Tex.), 45 S. W. Rep. 156; Williams *v.* Rand (Tex.), 30 S. W. Rep. 509; Hillman *v.* White (Ky.), 44 S. W. Rep. 111 [1898].
[11] Baldwin *v.* Durfee (Cal.), 48 Pac. Rep. 724.
[12] Chicago, etc., R. Co. *v.* Groh (Wis.), 55 N. W. Rep. 714.
[13] Sharrock *v.* Ritter (Tex.), 45 S. W. Rep. 156; Duke *v.* Helms (Tenn.), 45 S. W. Rep. 465.
[14] Mission *v.* Cronin (Sup.), 36 N. Y. Supp. 77.

instructions. If there is sufficient evidence to go to the jury upon the question, it is error to refuse an instruction that if the jury believe that plaintiff's fences, together with natural barriers, formed an inclosure sufficient to turn cattle, it was sufficient for the purpose of possession.[1] The sea, a lake, a river, a slough, a ledge of rocks on one side of a field will constitute an inclosure for that side sufficient to give adverse possession.[2] A title adverse to the owner of a house may be acquired by prescription in a strip of land adjacent thereto, although the eaves of the house project and discharge water over the strip.[3] The whole essence of the occupation and the acts evidencing it may be embodied in the answer to the question, "Were the acts such as would bring to any one who claimed title to the land notice of the fact that the possessor claimed, and was exercising, an ownership over it adversely to his claims?" If answered in the affirmative, the possession will be actual.

523. Payment of Taxes.—Payment of taxes is not an occupation; it is merely evidence of an adverse claim of title.[4] It alone confers no right to land.[5] The possession should be corporeal.[6] Payment of taxes for twenty-five years is strong evidence of a claim of title, and the failure to make claim or to pay the taxes is some evidence of an abandonment of any rights in the property.[7] To make such an act evidence of adverse possession the person paying taxes must have an interest in the claim of title to the land.[8] The books of the assessor of the town in which the land lies are admissible as evidence, to show to whom the land was assessed during the statutory period.[9]

Where the taxes for a year do not become due and payable until after the period, necessary to perfect title under the five years' statute of limitations, ends, title becomes perfect under the statute without payment of the taxes for that year.[10]

524. Adverse Possession under Color of Title.—Thus far we have treated only of the cases where the ownership was claimed entirely as a result of the adverse possession. No deed or equivalent muniment is necessary when actual possession has been maintained under adverse claim.[11]

A party who claims against the legal owner, who has entered without color of title, and who relies wholly on his adverse possession must show an actual

[1] Goodwin *v.* McCabe, 75 Cal. 584 [1887].

[2] Flint *v.* Long (Wash.), 41 Pac. Rep. 49.

[3] Randall *v.* Sanderson, 111 Mass. 114 [1872].

[4] Wren *v.* Parker (Conn.), 18 Atl. Rep. 790; Cashman *v.* Cashman's Heirs (Mo.), 27 S. W. Rep. 549; Langdon *v.* Templeton (Vt.), 28 Atl. Rep. 866; Whitman *v.* Shaw (Mass.), 44 N. E. Rep. 333.

[5] Durfee *v.* Peoria, etc., Ry. Co. (Ill.), 30 N. E. Rep. 686; Hilburn *v.* Harris (Tex.), 29 S. W. Rep. 923.

[6] Chamberlain *v.* Abadie (La.), 19 So. Rep. 574; Gage *v.* Smith (Ill.), 31 N. E. Rep. 430.

[7] Holtzman *v.* Douglas, 18 Sup. Ct. Rep. 65, 168 U. S. 278 [1897].

[8] Thatcher *v.* Gottleib (C. C. A.), 59 Fed. Rep. 872.

[9] Elwell *v.* Hinckley, 138 Mass. 225 [1885]; Wren *v.* Parker (Conn.), 18 Atl. Rep. 790; Pasley *v.* Richardson (N. C.), 26 S. E. Rep. 32.

[10] Halbert *v.* Brown (Tex.), 31 S. W. Rep. 535. *But see* Neilson *v.* Grignon (Wis.), 55 N. W. Rep. 890.

[11] Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 604.

occupation to a definite line or a substantial inclosure, and to defeat the legal title the possession must have been definite, positive, and notorious.

When land is claimed under the right of possession only, its extent is confined to the limits actually occupied, inclosed, and cultivated under claim of ownership; but when the land has been entered upon, occupied, and improved under a deed or other written document, usually spoken of as color of title, the possessor acquires a good title to all that his deed or instrument of title describes or professes to convey.[1] And this is true even though his deed or instrument of conveyance be good for nothing. He must, however, have had the possession of the land entirely to himself; for if the true owner has had possession of any part of the tract, the disseizor's claim will be confined to the part he has had inclosed and has actually occupied or possessed. His possession of a part cannot be extended to the whole if the true owner has had possession of any part of the land. The real owner, having the better claim, is better entitled to the land to which both may equally claim possession.[2]

525. Adverse Possession must be Open, Visible, and Notorious.—For the disseizor to claim adverse possession to anything at all, the occupation must have been open, visible, notorious, and exclusive of the part claimed.[3] There must be no stealthiness or secretiveness in the occupation. It must be open and notorious, and if held under color of title it seems the instrument of title should be registered. A secret deed which is not recorded, given to a party who occupies or has occupied under recorded leases recently expired, will not amount to an entry under color of title, and to an adverse possession, unless the true owner is given notice.[4] If A is entitled to a conveyance of land, and by an agreement between A and B, in order to defraud A's creditors, the land is conveyed to B, a title to the land by adverse possession of more than twenty years is acquired by A against B if B knows that A is holding the land adversely and under a claim of right during his possession, although A is without means to pay his debts during such possession.[5]

526. What is Color of Title.—Color of title has been defined to be that which has the appearance of title, but which is in reality no title;[6] a deed not executed in proper manner; a conveyance from one who does not own the land, or who has no authority from the real owner to execute a conveyance; in fact any instrument purporting to be a conveyance, but that does not for some reason have that effect. Such color of title might be a bequest under will by descent, a deed not recorded, an invalid or void bond for title, an ancient deed, a mortgagee's deed, a deed without seal, an administrator's deed, a guardian's deed, a void patent, a deed from one having no title if

[1] Kendrick *v.* Latham (Fla.), 6 So. Rep. 871.
[2] Jackson *v.* Woodruff, 1 Cowen 276.
[3] 1 Amer. & Eng. Ency. Law 262; Delong *v.* Mulcher, 47 Iowa 445 [1877].
[4] *See* 1 Amer. & Eng. Ency. Law 276.
[5] Elwell *v.* Hinckley, 138 Mass. 225 [1885].
[6] Swift *v.* Mulkey (Oreg.), 21 Pac. Rep. 871.

grantee is ignorant, an infant's deed, a deed with but one witness when two are required.

The claimant who enters under a color of title may claim and hold to the boundaries described, after adverse possession for the statutory period. As to what is color of title is a question of law for the court. The question of occupancy under it is one of fact for the jury.[1]

An absolute nullity, as a void deed, judgment, etc., will not constitute color of title[2] if the invalidity be apparent on the face of the deed.[3]

The record of a survey does not of itself constitute color of title, nor does an executory contract, nor a deed signed by one as "agent," nor a void judgment of a court, a tax certificate, nor an instrument in which the grantor admits title in another. Possession taken under a mortgage before foreclosure is not adverse possession under such claim and color of title, with payment of taxes.[4]

Possession by a railroad, under a verbal gift, of a right of way is sufficiently adverse to set in motion the statute of limitations,[5] as is a parol gift of land made by a father-in-law to his son-in-law, who entered, made valuable improvements, continued in possession, claiming the land as his own, and then conveyed it to a purchaser for value.[6] In determining the character of the possession of one claiming title to land by gift, the real question is not so much what was intended by the donor as what was the donee's understanding, what he claimed and did. If it be found that he believed the gift to be absolute, and went into possession under that belief and held adversely to the donor for twenty-one years, the verdict must be for him.[7]

To constitute a color of title the instrument (deed) by which the conveyance is attempted must define the extent of the claim. Such a deed is one whose description fails; as, e.g., a description starting at a corner named, "thence east 27 chains 50 links to John Farwell's patent," etc., which gave only a line, and no area whatever, when applied to the ground. It was not competent to give color of title, because no definite boundaries were described and no land included by them.

A bad title will answer for color of title; but if no lands are described, nothing can pass. If the deed under which constructive possession is claimed contains no description that can be located upon the ground, then there is nothing to limit his claims of possession except what has actually been occupied.[8]

[1] 1 Amer. & Eng. Ency. Law 276, 277.

[2] 1 Amer. & Eng. Ency. Law 288; Curdy *v.* Stafford (Tex.), 27 S. W. Rep. 823. *But see* Murphy *v.* Doyle, 33 N. W. Rep 220, 37 Minn. 113; Miesen *v.* Canfield (Minn.), 67 N. W. Rep. 632.

[3] Bartlett *v.* Ambrose, 78 Fed. Rep. 839.

[4] Johnson *v.* Davidson (Ill.), 44 N. E. Rep. 499.

[5] Shepard *v.* Galveston, H. & H. R. Co. (Tex. Civ. App.), 22 S. W. Rep. 267.

[6] Studstill *v.* Willcox (Ga.), 20 S. E. Rep. 120.

[7] Moreland *v.* Moreland (Pa.), 15 Atl. Rep. 655 [1888].

[8] Jackson *v.* Woodruff, 1 Cowen 276. *See* Goodwin *v.* McCabe, 75 Cal. 584.

By the same rule, a person who took possession of lot No. 5 under a deed for the adjoining lot No. 4, believing it to be his lot and claiming it as such, was held to have acquired adverse possession of only so much of lot No. 5 as he actually had occupied and improved, because no part of lot No. 5 was described in his deed. The general statement that the occupation of part of a tract will give title to all that the color of title covers or describes should be accepted with some discretion. While it is reasonable and just enough in case of a single farm or lot of land where cultivation, improvement, and husbandry are carried on, it would be mischievous indeed if a person producing a worthless title, perhaps from one who had not the slightest claim, could acquire title to a thousand acres described by the ocupation and improvement of one acre only. No such doctrine was ever intended to be sanctioned by the courts.[1]

When a man has occupied under color of title adversely and exclusively, he may hold to the boundaries described in the instrument under which he claims. He must have the full constructive possession entirely to himself, exclusive of the true owner, or he will be confined to his actual possession.[2]

The occupant under color of title is confined to the boundary-line described in his deed and cannot claim outside that line. He may acquire title outside by actual possession only. A plat or survey may be used in connection with other evidence to fix the origin, date, and limits of the possession.[3]

But in Missouri there seems to exist a different rule where the boundaries of the lot claimed are given on a town map, in which case the claim must be under such map to make it available.[4] The extent of the possession is confined to the limits claimed at the time of entry. The fact that the titles have been obtained from different sources makes no material difference if the tracts covered by the titles adjoin each other and are all in one inclosure, and no one but the claimant is residing upon them.[5]

527. Adverse Possession of Mines.—Adverse possession may be acquired of a mine, a mining claim, a quarry, or a vault. When the minerals below the surface have been severed by deed, no interest is acquired in them by adverse possession of the surface. To lay claim to a mine below the surface, the occupant must prove possession of the mine independently.[6] Similarly the possession of a vault beneath the surface was held not to be a possession of the surface.[7]

The same general principles apply to the adverse use of a mining claim as

[1] Woodworth, J., in Jackson *v.* Woodruff, 1 Cowen 276.

[2] 1 Amer. & Eng. Ency. Law 290.

[3] Dorr *v.* School Dist., 40 Ark. 237; Heaver *v.* Morgan (W. Va.), 23 S. E. Rep. 874; Fullam *v.* Foster (Vt.), 35 Atl. Rep. 484.

[4] St. Louis *v.* Gorman, 29 Mo. 593.

[5] Wharton *v.* Bunting, 73 Ill. 16.

[6] 1 Amer. & Eng. Ency. Law 296; Lulay *v.* Barnes (Pa.), 34 Atl. Rep. 52; Kingsley *v.* Hillside C. & I. Co. (Pa.), 23 Atl. Rep. 250.

[7] Keonings *v.* Jung (Wis.), 40 N.W. Rep. 801 [1889].

to that of land. The possession must be open, adverse, actual, continuous, exclusive, etc., the same as to acquire title to land. The mining, to constitute actual possession, must be prosecuted as continuously as the nature of the business and the custom and convenience of the country will permit.[1]

The mere digging for coal in the winter, the property being abandoned the rest of the year, is a mere act of trespass and will not constitute adverse possession.[2]

528. Owner must have had Notice of Adverse Possession.—The adverse nature of the possession must be manifest to the owner, who must have notice, by some means, that his land is held adversely to him and hostile to his claim. To give this notice it is not necessary that the occupant should prepare and deliver a manuscript declaration of his claims, nor go to the owner to declare in person that he holds it as his own. Mere acts of ownership, such as are usually exercised over land, are, at law, notice to all the world. If their hostile character be such that an owner who is reasonably careful of his interests would discover the adverse possession, they will be deemed sufficient to give notice.[3] It has been held that the owner of the land should know of it.[4] The recording of a deed of conveyance in the county registry is a notice to the world and therefore to the party.[5]

Any act which is sufficient to put a person on inquiry is sufficient for adverse possession, such as visible and notorious ownership under a claim of right.[6] Mere acts of trespass will not be notice of adverse possession; the occupation must be of such a character that if the owner visited the land he might see visible signs of hostile possession: habitations, inclosures, cultivation—something to show him that some one is disputing his title.

A mere notice posted on the land declaring an intention to hold property is insufficient.[7] Yet where one of two tenants-in-common of a party-wall built the wall to an increased height, and on one of the stones was placed an inscription stating that the wall and the land on which it stood belonged to him, it was held that on these facts a jury might find an actual ouster upon which plaintiff might maintain an action against defendant.[8] Such an inscription on a wall will prevent an adverse possession arising even though the person has not asserted his claims of ownership for thirty years.[9]

Operating a railroad over land, even though there is nothing recorded showing the extent claimed. Building a shed, cutting wood, quarrying and burning limestone, and the ordinary operations of farming, if carried to a reasonable extent, have been held to give notice. Actual inclosure is not

[1] Stephenson *v.* Wilson, 50 Wis. 95; 37 Wis. 482; 40 Wis. 594.
[2] Jackson *v.* Stoetzel, 87 Pa. St. 302.
[3] Graydon *v.* Hurd (C. C. A.), 55 Fed. Rep. 724; Goodson *v.* Brothers (Ala.), 20 So. Rep. 443; Unger *v.* Mooney, 63 Cal. 586.
[4] Reimer *v.* Stuber, 20 Pa. St. 458.
[5] Forest *v.* Jackson, 56 N. H. 357; Bracken *v.* Jones, 63 Tex. 184.
[6] Yelverton *v.* Steele, 40 Mich. 538 [1879].
[7] Lynde *v.* Williams, 68 Mo. 365.
[8] Stedman *v.* Smith, 8 E. & B. 1 [1857].
[9] Phillipson *v.* Gibbon, L. R. 6 Ch. 428.

sufficient, nor is cutting timber, marking of trees, and making an entry or survey.[1]

An owner of land is supposed to know the locality and the boundaries of his property, and he is chargeable with notice of the meaning and locality of every settlement made upon it by another without his authority.[2] He cannot plead his ignorance of others' possessions and adverse claims to his land, nor does the fact that he lives apart from the land, or even at a great distance, relieve him from the notice. Though expected to know the boundaries of his land, he would not be chargeable with notice that an adjoining owner had encroached upon him a few feet by building his fence over the line.[3]

It has been held that if a person pass over the corner of a farm for twenty years unknown to the owner, not secretly, he has a prescriptive right. However, evidence of ignorance of the owner is admissible.[4]

The personal presence of an adverse claimant is not required. He may occupy by his agent or tenants, or by a purchaser under contract,[5] or a woman by her husband.[6] The possession of one's agent is, for the purpose of the statute of limitations, the possession of the principal.[7] Possession by a husband or wife after the death of either is adverse to the heirs.[8] Possession of land by one who acts as bailiff or tenant both for the rightful owner and for an adverse claimant is the possession of the rightful owner.[9]

529. The Possession must be Continuous and not Interrupted.—If the true owner succeeds in depriving the occupant of possession, the time already occupied by the latter goes for naught, and he must begin anew. An abandonment of the premises even with the intention of returning shortly will deprive the occupant of the benefit of the time he has held, unless he has held for the full period.[10] And this is true even though the taxes are assessed against him.[11] Every discontinuance of possession restores the possession to the rightful owner, and causes the occupant to forfeit any and every claim that he may have acquired. If he re-enter, it is a new entry and cannot be added to the time occupied previous to the abandonment.[12]

An interruption for one day only is sufficient to destroy the occupant's adverse possession, and to require him to continuously hold for the full statutory period after the date of the interruption;[13] but if title has been

[1] Yelverton *v.* Steele, 40 Mich. 538 [1879].
[2] Brownson *v.* Scanlan, 59 Tex. 222.
[3] Bracken *v.* Jones, 63 Tex. 184.
[4] Hennefin *v.* Blake, 102 Mass. 297.
[5] Cox *v.* Daugherty (Ark.), 36 S. W. Rep. 184.
[6] Wood *v* Armour (Wis.), 60 N. W. Rep. 791; McCleod *v.* Bishop (Ala.), 20 So. Rep. 130; Brown *v.* Bocquin (Ark.), 20 S. W. Rep. 813.
[7] Lantry *v.* Parker (Neb.), 55 N. W. Rep. 962.
[8] Pattison *v.* Dryer (Mich.), 57 N. W. Rep. 814; Berkowitz *v.* Brown, 23 N. Y. Supp. 792. *See* Everett *v.* Newton (N. C.), 23 S. E. Rep. 961.
[9] Zirngibl *v.* Calumet & C. Canal & Dock Co. (Ill. Sup.), 42 N. E. Rep. 431; Harper *v.* Morse (Mo.), 21 S. W. Rep. 517.
[10] Susquehanna R. Co. *v.* Quick, 68 Pa. St. 189.
[11] Louisville & N. C. Ry. Co. *v.* Philyaw (Ala.), 6 So. Rep. 837.
[12] 1 Amer. & Eng. Ency. Law 272.
[13] Olwine *v.* Holman, 23 Pa. St. 279.

acquired by possession for the full period, it cannot be lost by absence, abandonment, or interruption, but only by the same adverse possession for the full period by which the person secured it himself.[1] Whether the possession has been continuous or interrupted is a question of fact, and therefore one for the jury.[2] What constitutes possession, interruption, or abandonment is a question for the court.[3]

No presumption arises that an adverse possession of land shown to have existed for a time continues for a sufficient period to give title by adverse possession;[4] but its continuance for the statutory period under a claim or color of title must be proved.[5] The presumption is that the possession of land is in subordination to the legal title.[6] Possession must be proven for the full period required by statute. Proof that a person took adverse possession of land "about" May 1, 1866, and remained in possession until "about" May 1, 1886, is not sufficient to prove title by adverse possession, the statute of limitations being twenty years.[7]

The possession must have been adverse throughout the whole period. Uninterrupted possession when it has been in subordination to the true owner for a part of the time cannot be counted and added on to make the full period required. The same applies to occupation under color of title. There must have been an actual continuous possession of a part, and a claim of the whole, without interruption, for the whole period.[8]

530. What is an Abandonment or Interruption.—A recovery by the owner in an action of ejectment and the enforcement of the writ of possession will interrupt adverse possession;[9] but an action brought by the owner and afterwards dismissed will not interrupt the adverse holding.[10] An order of the court requiring the conveyance of the land will interrupt the occupation.[11]

An agreement to arbitrate between the occupant and the owner will cause an interruption.[12] An effort by the occupant to purchase the property from the true owner is a recognition of the latter's title, and if made within the statutory period, and not to settle any real or threatened litigation, is such an admission of the owner's title as will interrupt the running of the statute.[13] Such an offer is not, however, conclusive of the want of title.[14] An effort to buy, or the actual buying, of outstanding claims is not an abandonment of possession, or an acknowledgment that such claims are valid.[15]

[1] Shriver *v.* Shriver, 86 N. Y. 57; Spofford *v.* Bennett, 55 Tex. 293.
[2] 1 Amer. & Eng. Ency. Law 272.
[3] Banks *v.* Collins (Ky.), 39 S. W. Rep. 519.
[4] Woods *v.* Hull (Tex.), 38 S. W. Rep. 165.
[5] Atkinson *v.* Smith (Va.), 24 S. E. Rep. 901. *But see* Hollingsworth *v.* Walker (Ala.), 13 So. Rep. 6.
[6] Sanders *v.* Riedinger (Sup.), 43 N. Y. Supp. 127. *But see* Alexander *v.* Gibbon (N. C.), 24 S. E. Rep. 748.
[7] Allis *v.* Field (Wis.), 62 N. W. Rep. 85.
[8] 1 Amer. & Eng. Ency. Law 269.
[9] Dun *v.* Miller, 75 Mo. 260.
[10] 1 Amer. & Eng. Ency. Law 275.
[11] Gower *v.* Quinlan, 40 Mich. 572 [1879].
[12] Perkins *v.* Blood, 36 Vt. 273.
[13] Litchfield *v.* Sewell (Ia.), 66 N. W. Rep. 104.
[14] Warren *v.* Bowdran (Mass.), 31 N.E. Rep. 300.
[15] 1 Amer. & Eng. Ency. Law 275; Chapin *v.* Hunt, 40 Mich. 595 [1879].

The recording of a conveyance of underlying coal is not an entry interrupting adverse possession of the surface of the land.[1] The continuity of possession is not broken by a sheriff's sale, and deeds of the land during such possession.[2]

If the claimant yield his possession when threatened with legal proceedings by the owner, or if he accept a lease from him, or make an agreement for a consideration that the owner will not bring suit to recover possession of the land, these acts amount to an acknowledgment by the claimant of the owner's superior title and may destroy his adverse holding.

The paying of rent to one who is not the owner and whose title is imperfect will not amount to an interruption,[3] for the occupant may hold adversely to certain persons and not as regards others.[4] However, his actual possession must be adverse to all the world, not merely to one who sues for the land.[5]

Mere acts of trespass, such as tearing down a fence by an adjoining owner, violent acts by strangers, as tearing down the house and making the premises uninhabitable, interference and occupation by an army in times of war, will not arrest the possession, or stop the running of the statute in the claimant's favor.[6]

Adverse possession may be interrupted by abandonment of premises for a sufficient period to interrupt the continuity. Neglect and abandonment by the claimant will work a forfeiture; as, e.g., by beginning the erection of a house and, after leaving it partly built, returning some months later to finish and occupy it,[7] or by permitting the fences that inclose the land to decay and become insufficient to protect the land.[8] But when a fence was maintained intact for a number of years, when gaps were cut in it, and left down for two or three years, but the posts remained standing, with the wires thereon, and it could be seen that a fence was around the land, though there were gaps in it, it was held that such fence was sufficient to give notice of adverse possession, and that plaintiffs were entitled to the land.[9] The posts should not be any considerable distance apart.[10]

The fact that a purchaser does not take possession by tenant until two months after purchase does not break a continuity of possession unless there be evidence of an intention to abandon.[11] Vacancy for two years because the claimant was unable to find a tenant will not destroy the continuity of possession.[12]

[1] Finnegan *v.* Penna. Trust Co., 5 Pa. Super. Ct. 124 [1897].
[2] Goodsen *v.* Brothers (Ala.), 20 So. Rep. 443.
[3] Donahue *v.* Oleonor, 45 N. Y. Sup. Ct. 278.
[4] Portis *v.* Hill, 14 Tex. 69.
[5] Bracken *v.* Union Pac. Ry. Co. (C. C. A.), 75 Fed. Rep. 347.
[6] 1 Amer. & Eng. Ency. Law 273; Ford *v.* Wilson, 35 Miss. 490; Duren *v.* Sinclair, 22 S. C. 361.
[7] Byrne *v.* Lowry, 19 Ga. 27.
[8] Borel *v.* Rollins, 30 Cal. 408.
[9] Moore *v.* McCown (Tex. Civ. App.), 20 S. W. Rep. 1112.
[10] Freedman *v.* Bonner (Tex. Civ. App.), 46 S. W. Rep. 47.
[11] Gary *v.* Woodham (Ala.), 15 So. Rep. 840.
[12] Downing *v.* Mayes (Ill.), 38 N. E. Rep. 620.

Absence from the land at times, leaving them vacant, but with no intention of abandoning possession, will not amount to an interruption; e.g., a short absence on business. If one member of the family remains, it will prevent interruption, as will an agent or tenant who is left in possession.[1] Where a person enters on land under color of title, and cultivates the land, except for one year, during which he pastured it, and keeps up the farm fences, he cannot because no one actually resided on the land, be said, as a matter of law, to have abandoned the possession.[2]

531. Exclusive Possession and Interruption Determined by Location and Character of Land.—What is an adverse and exclusive possession, and what is an interruption of such possession, depends very much upon the character of the land, and the purposes to which it is adapted and for which it is used. The adverse possession of an outlying lot of small value, remote from the dwellings of people, suitable for pasturing or for the growth of wood or for other purposes of husbandry, requires a very different proof from that which establishes the exclusive occupation of a residence or a shop or a storehouse within the limits of a city. The rule of law is the same in each case, but the evidence necessary to prove the fact is very different. In either case the question is, "Has the adverse possession, considering the nature, situation, and uses of the land, been exclusive and continuous?" This is a question for the jury; and although there may be cases of such a nature and so plain that it would be the duty of the court to rule as a matter of law that the adverse possession has been interrupted, yet the general principle is that it is a question for the jury.*

532. Interference or Overlapping of Title.—When the descriptions of lands in the deeds of two claimants cover or include a piece or strip of the same land there is said to be an interference of title. If either actually occupies and improves the overlapping piece for the statutory period openly, adversely, continuously, and exclusively, he will have obtained exclusive ownership. If neither owner has actual possession of the land or strip in conflict, the constructive possession will be in the one who has the older grant.[3] A constructive possession to the unimproved part of a tract which two adverse claimants have claim to will remain in him who made the first entry under claim of title and who improved a part of the tract.[4]

For the junior grantee to acquire title by adverse possession to the disputed piece, his occupation must extend to the land in controversy. If the junior claimant occupy but a part of the land covered by his title, an entry and occupation by the owner of the older title will oust him from the possession of all the land covered by the older title except what is actually in possession of the junior claimant.[5]

[1] 1 Amer. & Eng. Ency. Law 274.
[2] Perry *v.* Lawson (Ala.), 20 So. Rep. 611.
[3] 1 Amer. & Eng. Ency. Law 288, 289.
[4] Jackson *v.* Vermilyea, 6 Cowen 677.
[5] 1 Amer. & Eng. Ency. Law 289.

* *See* Sec. 521, *supra*.

If two persons are in possession, each claiming under color of title, the benefit of the possession will be given to the one having the better title.[1] Other things being equal, the legal right will claim the benefit of the possession. It will be a rare case that presents identically the same circumstances, precisely coeval and concurrent. Priority of time will in general close the door against the later title and occupancy.[2]

533. Color of Title and Good Faith.—It is often said that good faith is necessary to acquire land under color of title. By good faith is not to be understood honest belief by the claimant that he has the best title or even any title at all. It is good faith in claiming possession and title: the real and persistent intention to claim the possession as his own, distinct from and hostile to the owner. It is not necessary that the claim of the title should be good or even believed to be good.[3] It is enough if there be a real intention to assert and rely on it as hostile to the true owner. Some courts go so far as to declare that, however wrongful or fraudulent the possession, or defective the title, an entry under claim of exclusive title, founding such claim upon color of title, accompanied by the continued statutory possession, constitutes an effective adverse possession.[4] This seems to be the rule in New York, Kansas, and Georgia. The claimant may know his color of title is good for nothing, and that he has not the remotest right to the land; but if he assert and maintain his possession under his worthless color of title, it will ripen into a good title. There is some conflict as to how innocent the occupant must have been when he accepted the conveyance or color of title. Fraud will not be presumed, but if proven it may destroy the color of title. It has been held that no color of title was obtained when the occupant knew his grantor was a mere squatter.[5] His claim may be invalid if he knew the grantor had no title to convey, or if he obtained his deed by fraud.[6]

What is good faith is a question for the jury, but each particular case with its different circumstances may receive a different finding, depending upon the intelligence and impartiality of each jury. A parol agreement may give color of title. Where heirs verbally agree between themselves for a division, or neighbors exchange farms, or a father gives to one of his children a certain tract, these acts have been held to give good color of title, sufficient to extend the possession of a part to the whole. For such a verbal agreement to amount to color of title, the whole tract must be definite and its limits determined by some visible acts, signs, marks, or indications which are apparent to all.[7]

It is doubtless this element of definite boundaries, showing the extent

[1] Bellis *v.* Bellis, 122 Mass. 414; Winter *v.* Stevens, 9 Allen 526; Crispin *v.* Hannovan, 50 Mo. 536.

[2] Simpson *v.* Downing, 23 Wend. 316.

[3] Lantry *v.* Wolff (Neb.), 68 N.W. Rep. 494.

[4] 1 Amer. & Eng. Ency. Law 288.

[5] McCarney *v.* Higdon, 50 Ga. 629. *See* Redfield *v.* Parks, 132 U. S. 239 [1889].

[6] Saxton *v.* Hunt, 20 N. J. Law 487. *But see* Cornelius *v.* Giberson, 25 N. J. Law 1.

[7] 1 Amer. & Eng. Ency. Law 280.

claimed, that gives an occupant title to the whole when he has occupied a part under color of title. Without something to show how much he intended to claim when he took possession, he might, when his title had ripened, lay claim to the whole county. A parol gift, accompanied by possession and a claim of ownership, may constitute color of title, and if the donee holds adversely and as his own, the possession will ripen into title.

Where an absolute gift of land is made by a father to his son, or by a divorced husband to his wife, and the donee takes and holds possession under such gift, his (or her) possession is adverse and continues so, and the father or husband is presumed to have notice of such possession.[1] And one in possession of land under a verbal gift from a person claiming adversely is likewise in adverse possession under the same claim by which his donor held it.[2] Parol evidence of a former owner showing a verbal gift of land to a railroad for right of way, although not admissible to establish an easement therein, is admissible for the purpose of showing that the possession of the railroad was adverse.[3]

Such a parol gift conveys no title and may be revoked at any time before the full period has elapsed, but it may be the beginning of an adverse possession by the donee, which can be repelled only by proof of a subsequent recognition of the donor's better title.[4]

534. There can be No Adverse Possession against the Public nor the Representative Government.*—Adverse possession cannot be held against United States, nor against the state unless the state is especially included in the operation of the statute of limitations, which gives right or title under adverse possession. Individuals cannot in many states acquire rights against the public by adverse user of the public highways, public parks, navigable streams, or other things in which the public has inherent rights and privileges.

The reason for this is that if individuals were allowed to acquire adverse or prescriptive rights against the public or the representative government, the public and the state would be required to watch their innumerable possessions, public ways, and rights to protect them. This they cannot do. The business of the government and public being transmitted entirely through agents who are numerous and scattered, the utmost vigilance would not protect the public from losses and from combinations to defraud the government. The government is therefore exempt from the operation of the statute which gives rights by adverse possession upon the grounds of public policy and not upon the notion of extraordinary prerogative.

No adverse possession can be had in lands owned by the United States or

[1] Thompson *v.* Thompson (Ky.), 20 S. W. Rep. 373; Ross *v.* McCain (Mo.), 46 S. W. Rep 955; Spradlin *v.* Spradlin (Ky.), 18 S. W. Rep. 14; Schafer *v.* Hauser (Mich.), 70 N. W. Rep. 136.

[2] Mexia *v.* Lewis (Tex.), 21 S. W. Rep. 1016.

[3] Shepard *v.* Galveston, H. & H. R. Co. (Tex.), 22 S.W. Rep. 267.

[4] Sumner *v.* Stevens, 6 Met. 337.

* *See* Secs. 682–685, *infra*.

in state lands unless by the terms of the statute of limitations the state is expressly included within its terms. However, the person in possession may hold adversely against another individual claimant.[1] In some states statutes have been enacted limiting the time within which the state may assert its right to land which has been held adversely. These states are Massachusetts, Mississippi, New York, North Carolina, and South Carolina. In other states there is the presumption of a grant after one has had adverse possession for a long time, the period varying in different states.[2]

In North Carolina, Texas, and Pennsylvania the law as to whether title to highways, streets, parks, and other public property can be acquired against a municipal or *quasi*-municipal corporation by adverse possession is not settled. Each side of the question has in its support a long list of authorities. The courts of Arkansas, Connecticut, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Texas, Vermont, and West Virginia have held that title can be acquired against municipalities. In some of these states it has been held that rights could be acquired by adverse possession in streets, alleys, public squares, and highways *owned* by the municipality. On the other hand it has been held in Alabama, California, Illinois, Indiana, Louisiana, Mississippi, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia that title cannot be acquired against a municipality. These courts maintain that no encroachment by an individual, however long continued, upon property held on a public trust and dedicated to the public can confer any title on the adverse occupant, but is a public nuisance and may be abated as such. Yet some of them hold that as to property of which the legal title is in the municipality and which may be alienated by it, the municipality is subject to limitation laws to the same extent as private individuals.[3] In those states which deny rights acquired by adverse possession it has been held that no parts of the streets or highway or public road or a navigable river could be acquired by adverse possession.

The law is so unsettled in regard to rights acquired by an individual by adverse possession in public lands and ways that it is impossible to make any statement that would have general application. Before passing upon such a question it will be necessary to study the cases of the particular jurisdiction in which the case arises. The law has had application not only to public ways on land and water, but also to schoolhouse, fire-engine house, and hospital sites, to burying-grounds, poorhouse tracts, and similar public interests.[4]

Adverse possession may be held of, and rights acquired in, land, water,

[1] 1 Amer. & Eng. Ency. Law (2d ed.) 876. *See* Franceour *v.* Newhouse, 14 Sawy. (U. S.) 600.

[2] *See* 1 Amer. & Eng. Ency. Law (2d ed.) 878.

[3] *See* California, Indiana, Louisiana, and Rhode Island cases cited in 1 Amer. & Eng. Ency. Law (2d ed.) 882.

[4] *See* 1 Amer. & Eng. Ency. Law (2d ed.) 875–882, *and cases collected.*

mines, quarries, and anything which is subject or incident to property in land, the possession and use of which infringes the rights of the owner and gives him a just cause of action against the occupant or user for trespass or infringement of his rights.[1] *

535. Adverse Possession of Railroad Right of Way.†—Railroads have not as a rule been held to be such *quasi*-public corporations as to except them from the statutes of limitations. Individuals may obtain vested and prescriptive rights in railroad companies' rights of way by adverse and continued use for the full period of the statute of limitations.[2]

A farmer may acquire title to a strip of land adjoining a railroad track and owned by the railroad if he cultivate said strip for the full statutory period.[3] Possession and cultivation of such strip will not be an adverse holding if the farmer has at all times urged the railroad company to complete the road through his farm, and has not, to the knowledge of the officers of the company, asserted a claim of title to the right of way.[4]

What constitutes adverse possession is frequently held to be a question for a jury, and it has been held that a charge that "running a fence across railroad company's roadbed not then in use, or cultivating the same at broken intervals, does not constitute adverse possession," is erroneous as invading the province of a jury.[5]

The act of laying pipe-lines for oil in an undergrade private right of way, for wagon travel only, across the lands of a railroad company is a trespass, even though such pipes do not injure the company's ownership of the fee,[6] and equity has jurisdiction to enjoin the use of such pipe-lines where the pipes extend underneath the tracks without the owner's consent.[7]

However, the right of a railroad company to build, maintain, and use a bridge over a highway was held consistent with, and not inherently adverse to, the right of other persons to possess the land, and to subject it to a public use, as to lay a pipe beneath the surface of a highway.[8]

536. Adverse Possession by Railroad Companies.—A railroad company may hold adverse possession of the lands of an individual or of another company, but the possession of a street by a railroad company under authority given by its charter is not adverse to the public unless the public be excluded from the street.[9]

[1] *See* 1 Amer. & Eng. Ency. Law (2d ed.) 874.
[2] Railroad Co. *v.* Houghton, 126 Ill. 233.
[3] Ill. Cent. Ry. Co. *v.* O'Connor, 39 N. E. Rep. 563; Railroad Co. *v.* Houghton, 126 Ill. 233.
[4] Halbert *v.* Mayesville, etc., R. Co. (Ky.), 33 S. W. Rep. 1121.
[5] Nashville, etc., Ry. Co. *v.* Hammond, 15 So. Rep. 935.
[6] United States Pipe-line Co. *v.* Delaware, L. & W. R. Co. (N. J.), 41 Atl. Rep. 759 [1898].
[7] Delaware, L. & W. R. Co. *v.* Breckenridge (N. J.), 41 Atl. Rep. 966.
[8] Penna. R. Co. *v.* Breckenridge, 38 Atl. Rep. 740.
[9] Wayzata *v.* Gt. Northern Ry. Co. (Minn.), 52 N. W. Rep. 913.

* *See* Secs. 107, 185, 212, 262, and 326, *supra*, and 671–700, and 726, *infra*.
† *See* Sec. 685, *infra*.

A railroad company claiming adverse title to a right of way lawfully in the possession of a rival company by virtue of condemnatory proceedings, cannot enjoin the latter company from proceeding to construct its road until just compensation is paid to the former company; it being necessary that the disputed right and title be first settled at law.[1]

The mere construction, maintenance, and occasional use by a railroad company (which has no conveyance of the land) of an ordinary railroad track across a platted street while it still remains unimproved and unfit for public use, and before public convenience or necessity requires it to be opened and improved for use as a street, does not constitute adverse possession, as against the public. Such occupancy must be presumed to be subject to the paramount right of the public.[2]

The act of a railroad in attempting to condemn land has been held a recognition of the owner's title.[3]

[1] Kanawha, G. J. & E. R. Co. *v.* Glen Jean, L. L. & D. W. R. Co., 30 S. E. Rep. 86.

[2] St. Paul & D. R. Co. *v.* City of Duluth, 76 N. W Rep. 35.

[3] Nebraska Ry. Co. *v.* Culver (Neb.), 52 N. W. Rep. 886.

CHAPTER XXIX.

CONSTRUCTION, INTERPRETATION, AND APPLICATION OF DESCRIPTIONS.

541. Descriptions in Deeds and Conveyances.—Probably the most puzzling of a surveyor's duties are those of understanding and interpreting descriptions of deeds. Frequently drawn up by members of the legal profession or by ignorant grantors, and copied by careless clerks, they come to his hands in a condition that sometimes provokes exasperation. He often finds particular and general descriptions in conflict, parts omitted, "north" written for "south", figures misplaced, and many other mistakes and misconstructions peculiar to the vagaries of man. What parts shall a surveyor regard under certain circumstances; how much shall he require; what shall he consider and accept of evidence offered by outsiders or by the parties themselves? These are questions which should be of interest to a surveyor. He should also know how a court regards them, and what it will receive and consider.

542. Parol Proof of Deeds and Descriptions.—Mistakes are made in surveys and in descriptions of surveys and in the copying of deeds, and it is often a question of importance as to how far these mistakes may be explained or corrected in the courts. It is a general rule that parol evidence is not admissible to alter, vary, or contradict a written instrument, but when there is uncertainty or ambiguity this rule is not to be construed in the strictest sense. Courts have made a distinction between what they term a *latent* and a *patent* ambiguity. If the description is so blind that the court is unable to ascertain the intention of the grantor, aided by the evidence of all the material circumstances of the case, then it is designated as a *patent* ambiguity, and the court will declare the instrument inoperative and void, because to hold otherwise would be to make a new instrument; but if, on the contrary, the court finds by inquiry into the surrounding circumstances that the description shows clearly and conclusively the intention of the grantor, then the ambiguity is *latent*, though the identity of the persons or property is doubtful and uncertain. In such a case, for the purpose of determining the parties, the subject-matter, or the quantity, the court may inquire into every material fact pertaining to the persons or the property.[1]

[1] Best (Chamb.) on Evidence 232, 233.

If an instrument fairly and fully represents the intent of the parties at the time of its execution, the duty of the court becomes merely one of interpretation and construction of the language employed, the object being to ascertain the express meaning of the parties. If that meaning *can be* ascertained, it cannot be controverted by any outside evidence. No new words can be added, and the court will not travel out of the four corners of the paper to determine the intention.[1] Parol evidence cannot be given to show that the grantor of a deed intended a different boundary-line from that actually designated as the division-line.[2]

Exceptions are made where parol evidence is admitted to explain or even to contradict a written contract or deed. Thus evidence "may be introduced to show (1) that the instrument was procured by fraud or misrepresentation, or (2) by duress, or (3) was executed for purposes forbidden by law, or (4) was executed by some person legally incompetent, or (5) was founded upon a mistake of material facts, or (6) that the instrument was always inchoate or conditional, or (7) that it has been in part or wholly discharged or modified by subsequent agreement, or (8) that a new agreement has been substituted by consent of the parties." To enable a jury to decide these questions any evidence of surrounding circumstances, or that partakes of the nature of explanation, or is reasonably calculated to place them in the situation of the parties at the time of execution of the deed will, in general, be received. The instrument itself must contain the intention of the parties or it will be void and inoperative; the intention must be determined from the contract, deed, or will; no direct evidence of expression of intention can be introduced. Evidence such as explains the meaning of words, of signs, abbreviations, figures, and diagrams, such as shows whether any person or property exists that answers the description of the instrument, or shows if the grantor or testator possessed any such estate, is explanatory evidence, and is admissible in all cases where any ambiguity or uncertainty exists. Evidence that shows outside relations of the parties or that will place the court in the position of the parties will be admitted. Where part of a contract is written and part unwritten, the part unwritten may be shown by evidence if it be not repugnant to, or inconsistent with, what is written.[3] Parol evidence may be introduced to explain an ambiguity in a deed, but not to enlarge or vary its terms. If the description identifies the premises intended to be conveyed, it is sufficient. For the purpose of sustaining a grant extrinsic evidence may be introduced to identify and establish the objects and calls in a deed.[4]

Parol evidence is admissible to fix a boundary which is variable, to show the location of a stake or stones referred to in the deed as a monument, or to locate the boundaries where an ambiguity exists on the face of a deed.[5] Such

[1] Best (Chamb.) on Evidence 231, 232.
[2] Fuller *v.* Weaver (Pa. Sup.), 34 Atl. Rep. 634.
[3] Brown *v.* Byne, 3 El. & Bl. 703.
[4] Stevens *v.* Wait, 112 Ill. 544.
[5] Opdyke *v.* Stephens, 4 Dutcher 89;

evidence is not objectionable on the ground that it alters, varies, or contradicts the written instrument.[1]

The record of a survey by a county surveyor, though it was not legally made, is competent evidence, as *tending to show* the location of the line in dispute;[2] though such return and map are not admissible to *vary* the clear terms of a survey, they are admissible to shed such light on the true location as they afford.[3]

543. Sufficiency of Description.—Land is described in five ways: (1) by natural boundaries, as streams, ponds, and natural objects; (2) by artificial boundaries, as walls, fences, and monuments; (3) by geometrical lines and angles, called metes and bounds, or distances and courses; (4) by lines and corners of adjoining or abutting estates; (5) by the numbers of lots, sections, ranges, townships, and other designated subdivisions of a city, county, or state. Frequently two or more of these methods of describing land are employed, for greater clearness and precision or for different parts of the field. Descriptions are not confined to any particular class. Regard should be had for the natural features of the estate, the earlier descriptions, and sometimes the wishes and even the whims of the parties. Many questions arise as to the meaning of the terms "adjoining," "abutting," "appurtenant"; as to what calls govern when two descriptions of the same tract are in conflict; and as to the sufficiency of the description.

It may seem that almost any description is sufficient in a conveyance of land, yet it is an unfortunate circumstance to have any ambiguity in the description of the subject-matter of the deed. Witnesses die or move away, facts are forgotten, maps and manuscripts destroyed, and the land itself is subject to change by erosion, accretion, subsidence, and disintegration. The drafting of a description is a task that demands scrupulous care and certainty. It should not be done in haste, and should be read and reread and every part verified and made complete.

Of the several methods of describing, that by monuments checked by courses and distances is without doubt the most certain and satisfactory.[4] The main thing to be considered is certainty. A lack of care in describing boundaries is usually the chief cause of trouble in determining them. Probably there are few surveyors and engineers who have not met in their practice descriptions which have been ridiculous as descriptions, but which as a means of determining the boundaries of an estate have been found far from amusing, or even interesting. One that shows an utter lack of foresight, as well as of after-thought, is the following: "Beginning at an iron pin set in the ground about eighteen inches from the northeast corner of where

Brown *v.* Willey, 42 Penn. St. 205; **Greeley** *v.* Weaver (Me.), 13 Atl. Rep. 575 [1888]; Reynolds *v.* Boston Rub. Co. (Mass.), 35 N. E. Rep. 677.

[1] **Raymond** *v.* Coffey, 5 Oregon 132 [1873].

[2] Holliday *v.* Maddox (Kan.), 18 Pac. Rep. 290 [1888].

[3] Curtis *v.* Aronson, 7 Atl. Rep. 886.

[4] 2 Amer. & Eng. Ency. Law 499.

Sidney Huntington's coal-house formerly stood," etc.; or the following: "Thence, S. 45 degrees E., ninety feet, to a stake and stones in range of a large rock near the bow of the schooners Peru and Avenger, when building; thence," etc. These might perhaps be preserved as precedents in conveyancing when it is necessary to be certain to a common intent only.[1]

544. A Description is Sufficient if the Land can be Located.—Where the words employed to describe a tract of land fail to do so in such a manner as to show what tract was intended, the deed will be void for uncertainty of description. If the description include a number of particulars, all of which are essential to ascertain the identity of the tract, no estate will pass except such as will agree with every part of the description; but if the tract intended to be conveyed is indicated with reasonable certainty, it will pass by the conveyance. The intention of the parties will prevail.[2] If the description be so definite and certain that a competent surveyor, with the records before him, can locate the land, it is sufficient.[3] The points or monuments of the boundary must be capable of being located with certainty. A stake must be fixed more definitely than when it was determined as somewhere within a space covered by a circle the radius of which was fifty feet or more.[4]

Property is often located by reference to a railroad line or to the right of way of a railroad, and this has been repeatedly declared a good description.[5] A deed to a railroad company of a right of way "along the line as surveyed and laid out" by the company's engineer is sufficiently certain, the line having been surveyed and distinctly marked by stakes stuck in the ground.[6] This was so held even when the survey consisted merely of walking over the land and suggesting a line, and marking the line on the fences with a knife.[7] A deed conveying the land south of a "railway cut" was held to convey only the land south of the upper and outer edge of the cut.[8]

Land was held sufficiently described when the deed called for a well-ascertained beginning point, whence the line was to be run to a designated monument, and then gave the course of every other call in the description.[9]

545. Conflicting Parts of Description will be Reconciled if Possible.—A deed is to be construed so as to make it effectual if it be possible. When one part of the description is false or impossible it will be rejected if what remains

[1] 39 Alb. Law Jour. 199, 219.

[2] McLaughlin *v.* Bishop, 35 N. J. Law 512 [1872]; Holmes *v.* Strautman, 35 Mo. 293 [1864].

[3] Dunstan *v.* Jamestown, 72 N. W. Rep. 899; Carter *v.* Chavalier (Ala.), 19 So. Rep. 798; Campbell *v.* Carruth (Fla.), 13 Se. Rep. 432; Smith *v.* Newell (U. S. C. C.), 86 Fed. Rep. 56.

[4] Wilkeson Coal & Coke Co. *v.* Driver (Wash.), 43 Pac. Rep. 889.

[5] McDonald *v.* Bayne (Ind.), 16 N. E. Rep. 795 [1888].

[6] Thompson *v.* Southern Cal. M. R. Co. (Cal.), 23 Pac. Rep. 130; Owensboro, etc., R. Co. *v.* Barker (Ky.), 37 S. W. Rep. 848; Denver, etc., Ry. Co. *v.* Lockwood (Kans.), 38 Pac. Rep. 794; Joplin C. M. Co. *v.* Joplin (Mo. Sup.), 27 S. W. Rep. 406.

[7] Ohio River R Co. *v.* Schon (W. Va.), 11 S. E. Rep. 18.

[8] Newton *v.* Louisville & N. R. Co. (Ala.), 19 So. Rep. 19.

[9] Muir *v.* Meredith (Cal.), 22 Pac. Rep. 1080.

will make a complete description.[1] That part which is certain must prevail over what is uncertain.[2] If the boundaries mentioned be inconsistent with each other, those will be retained which best describe the intention manifested on the face of the deed.[3]

A deed to land which gives an incorrect description thereof by metes and bounds, and also a correct description by lot numbers as shown on a map referred to, is sufficient to pass the title, the incorrect description being rejected.[4]

Where a description of land in an execution levy was, "the undivided ½ of the following described land, to wit, the S. E. ¼ of the N. W. ¼, and the S. W. ¼ of the N. E. ¼," while in subsequent proceedings the description was, "the undivided ½ of the S. E. ¼ of the N. W. ¼, and the S. W. ¼ of the N. E. ¼," it was held that the latter description meant the undivided ½ of the S. W. ¼ of the N. E. ¼, as well as the undivided ½ of the S. E. ¼ of the N. W. ¼, and that both descriptions were therefore identical and could not mislead any one.[5]

Every call in a description must be answered if it can be done, and none is to be rejected if all the parts can stand consistently together;[6] but a deed will always be construed according to the condition of things at the date thereof, and in the light of facts known to and in the minds of the parties at the time.[7]

A deed describing the premises as certain lots as laid down upon a map does not carry title to land the title of which became vested in the owner of the lots, after the filing of the map, by the vacation of the street upon which they abutted.[8]

546. Insufficient, Imperfect, and Ambiguous Descriptions.—A deed will be void for uncertainty of description when the words employed to describe a tract of land fail to show what tract was intended.[9] Premises upon which a grant is to operate must be so described therein that they can be identified and located.[10] "They must be so described *therein*," for it is well settled that if a description is complete nothing will pass by a deed except what is described in it, whatever the intention of the parties may have been.[11]

A description, "14 acres of land, a part of the northeast quarter of the southwest quarter of a certain section, town, range, county, and state," was

[1] Anderson *v.* Baughman, 7 Mich. 79; Johnston *v.* Scott, 11 Mich. 232.
[2] Richer *v.* Barry, 34 Me. 116; Tewksbury *v.* French, 44 Mich. 102.
[3] Gates *v.* Lewis, 7 Vt. 511.
[4] State Sav. Bank *v.* Stewart (Va.), 25 S. E. Rep. 543.
[5] Hoffman *v.* Buschman (Mich.), 55 N. W. Rep. 458.
[6] Herrick *v.* Hopkins, 10 Shep. (Me.) 217.
[7] Grogan *v.* Burling Mills, 124 Mass. 390; Wiley *v.* Sanders, 36 Mich. 60; McConnell *v.* Rathbun, 46 Mich. 305; Mineral Spgs. Mfg. Co. *v.* McCarty, 67 Conn. 279.
[8] Sanchez *v.* Grace M. E. Church (Cal.), 46 Pac. Rep. 2.
[9] Holmes *v.* Straitman, 35 Mo. 293.
[10] Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229.
[11] Thayer *v.* Fenton, 108 N. Y. 394.

held insufficient, the particular part not being designated.[1] Land described as "lying on Laurel, reference being had to a deed from J. R. to me for a more definite description," is too vague and uncertain without the introduction of the deed referred to.[2]

A conveyance of certain lands excepting 30 acres, where there is nothing to show what particular acres were excepted,[3] or one which gives the metes and bounds of the tract conveyed less certain lots already sold, without giving the location and boundaries of the lots sold, is defective and insufficient.[4] The description must be such that one can, from and by it, go upon the land and identify the premises as those conveyed by the deed.[5]

A description which is defective will not be cured by reference to another deed in which the description is no more definite.[6] A line described as "beginning by the mouth of B. creek and running straight to the white oak at the southwest corner of the 10-acre survey owned by plaintiff" was held insufficient to identify the land.[7]

A description of a road which makes it follow a specific line "as near as practicable" does not locate a road anywhere; nor is the defect cured by subsequent survey upon a definite line.[8]

Where the map and description show that the calls for the boundary of the grant are impossible calls; that the surveyor was not on the ground, and was mistaken as to the locality of the natural objects on which he relied for description; and that no surveyor can by those calls locate or identify the land, the conveyance is insufficient.[9]

Where the metes and bounds describing the land of a corporation utterly fail to inclose any area whatever and are so uncertain as to make it impossible to determine the territory of such corporation, an organization of municipal government incorporated under such a description will be a nullity.[10] A judgment ordering the sale of real estate "beginning at Pike street, on the east side of York street, in this city, running thence N. 296½ feet, more or less," does not sufficiently describe the property.[11] Deeds purporting to convey land, but containing no description or designation thereof, are invalid, and cannot be read in evidence.[12]

If the description does not show the state and county in which the land

[1] McRoberts *v.* McArthur (Minn.), 34 N. W. Rep. 903.
[2] Reed *v.* Reed, 93 N. C. 462 [1885].
[3] Zundel *v.* Baldwin (Ala.), 21 So. Rep. 420; Halley *v.* Fontaine (Tex.), 33 S. W. Rep. 260; Blakey *v.* Morris (Va.), 17 S. E. Rep. 126.
[4] People *v.* Mariposa Co., 31 Cal. 196 [1866].
[5] Daugherty *v.* Gates (Tex.), 35 S. W. Rep. 937.
[6] Halley *v.* Fontaine (Tex.), 33 S. W. Rep. 260.
[7] Harris *v.* Johnson (Ky.), 44 S. W. Rep. 948 [1898].
[8] Sonnek *v.* Minnesota Lake (Minn.), 52 N. W. Rep. 961.
[9] Scull *v.* United States, 98 U. S. 410 [1878].
[10] Enterprise *v.* State (Fla.), 10 So. Rep. 740; Watervliet *v.* Colonie (Sup.), 50 N. Y. Supp. 487.
[11] Meyer *v.* Covington (Ky.), 45 S. W. Rep. 769 [1898].
[12] Wilson *v.* Johnson (Ind. Sup.), 38 N. E. Rep. 38.

is situated, the meridian to which the range should be referred, or whether the township named in the description is north or south, it is insufficient for title;[1] but a deed which describes land by section, township, and range, without mentioning the meridian, county, or state, but which describes the grantor as being of a county and state wherein he owned land answering the description in the deed, has been held sufficient to pass title thereto.[2] A deed purporting to convey "the southeastern corner" of a certain quarter-section, or "the southwestern fractional part of the north one-half" of a specified quarter-section, without any dimensions, quantity, or locations, is void for uncertainty.[3]

547. Surplusage in a Description will be Rejected.—If the description contain surplusage or more calls than are necessary for the proper location of the land, or if it be duplicated, part of the calls may be ignored if the description will be complete without them.[4] When one of the courses of a survey is given wrongly, yet from the correct courses and distances which are given it is possible to complete the description by metes and bounds, the deed will not be void for uncertainty.[5] When, in a deed, land is described by metes and bounds, one of the boundaries being given as "east 200 feet by other land of said grantor on the passageway," and it appears that no passageway in fact exists, the clause in respect thereto may be omitted.[6]

If a part of a description is senseless and unmeaning, it will be rejected as surplusage if what remains will make the description certain. Thus where a tract is described by metes and bounds giving the courses and distances, and the southeast and west bounds of a tract are given with certainty, but the closing line is given in a direction which would not close at all, the bearing of the said line should be rejected, leaving the description to read, "thence to the point of beginning."[7]

If the description in a deed comprehends several particulars, all of which are necessary to ascertain the land conveyed, they must all be proved; and if unnecessary particulars are added which are not true, they will not vitiate the deed.[8]

548. A Particular Description will Control a General Reference or General Description.—If the land conveyed is described by reference to

[1] Hartigan *v.* Hoffman (Wash.), 47 Pac. Rep. 217; Halliday *v.* Hess (Ill.), 35 N. E. Rep. 380.

[2] Garden City S. Co. *v.* Miller (Ill. Sup.), 41 N. E. Rep. 753. *And see* Mee *v.* Benedict (Mich.), 57 N. W. Rep. 175; Hitchcock *v.* Southern I. & T. Co. (Tenn. Ch. App.), 38 S. W. Rep. 588.

[3] Morse *v.* Stockman (Wis.), 40 N. W. Rep. 679 [1889]; Tierney *v.* Brown (Miss.), 5 So. Rep. 104 [1889]; Jones *v.* Brinkley (N. C.), 29 S. E. Rep. 221 [1898].

[4] Sullivan *v.* Collins (Col. Sup.), 39 Pac. Rep. 334; Bray *v.* Adams (Mo. Sup.), 21 S. W. Rep. 853; Stark *v.* Spaulding (Ky.), 39 S. W. Rep. 234.

[5] Robinson *v.* Allison (Ala.), 19 So. Rep. 837.

[6] Treak *v.* Joslyn, 139 Mass. 94.

[7] Stevens *v.* Wait, 112 Ill. 544; Woodward *v.* Nims, 130 Mass. 70 [1881].

[8] Worthington *v.* Hylyer, 4 Marr. R. 196; Jackson *v.* Clark, 7 Johns. R. 217; Wilson *v.* Riddick (Iowa), 69 N. W. Rep. 1039.

known boundaries and monuments, the land so described cannot be restricted or enlarged by a subsequent (general) reference to the title-deeds under which the grantor holds, even if such reference is in the same deed.[1] An accurate description of permanent boundaries capable of being ascertained will limit the conveyance; and general references implying an addition to the premises in possession of the grantor or grantee will not pass title to land outside of the particular description.[2] *

It is a well-known rule of construction that a precedent particular description shall not be impaired by a subsequent general description. All parts should be made to harmonize if possible, but if they cannot be made to accord then the general description must give way to the particular one.[3] If the precedent particular description fails, if it is unintelligible and inapplicable, then there is another rule of law; a rule that what is most material and most certain will control that which is less material and less certain.[4] That which is clear and certain should always control that which is uncertain and senseless.

A clause at the end of a particular description by metes and bounds, "meaning and intending to convey the same premises conveyed to me," is merely a help to trace the title, and does not enlarge the grant.[5]

549. A General Description will Answer if the Particular Description Fail.—If the whole description is sufficient to ascertain the estate intended to be conveyed, and if the intention to convey that particular tract is clear although an incorrect specific or particular description has been given, and although this fails to agree with some other particulars in the description, yet title to the tract shall pass in order that the intent of the parties may be effected.[6] Thus a manifestly erroneous statement of a monument will not defeat the deed if the remaining description will locate the land.[7]

Where a line was described as "beginning at the sign-board on the north line of the N. E. quarter of section 17, in township 1, north, range 2, west, where two roads described intersect, running thence," etc., such description was held to be sufficient under the rule that the line need not be described with technical certainty, but only so as to enable a surveyor, with the assistance of points definitely named, to trace and designate it.[8]

Where land is described by a general description, which is followed by metes and bounds, and it is clear from the circumstances that the general description is correct and that the description by metes and bounds includes

[1] Morrow *v.* Willard, 30 Vt. 118.
[2] Thayer *v.* Fenton, 108 N. Y. 394.
[3] Wheaton *v.* Brick (N. J.), 8 Atl. Rep. 529 [1887]; Carter *v.* Chevalier (Ala.), 19 So. Rep. 798.
[4] Colter *v.* Mann, 18 Minn. 96.
[5] Brown *v.* Heard, 85 Me. 294.
[6] Colter *v.* Mann, 18 Minn. 96; McLaughlin *v.* Bishop, 35 N. J. Law 512 [1872].
[7] Benton *v.* McIntire (N. H.), 15 Atl. Rep. 413 [1888].
[8] Wells *v.* Rhodes (Ind.), 16 N. E. Rep. 830 [1889]; Adams *v.* Harrington, 14 N. E. Rep. 603.

* *See* Secs. 611–615, *infra*.

property not owned by the grantor and evidently not intended to be conveyed by him, the general description will hold and control.[1]

In tracing county lines the general rule is that "monuments control courses, and a specific course will control a general course"; but where a monument is uncertain a general course may be taken into consideration, in connection with other facts and circumstances, for the purpose of ascertaining and identifying such monument.[2]

If a deed describe the land conveyed by courses and monuments and boundary-lines of other tracts, and then declares that the description given is to be according to a survey theretofore made by a person named, such survey is incorporated into the deed and becomes a part of it, and the grantee acquires title only to the land contained within the exterior boundaries of such survey.[3] *

Under a conveyance of certain premises described (without specifying the quantity or dimensions) as lying in an angle formed by certain streets, but designated by a number not corresponding with the number of either of the two lots in such angle, it will be presumed that the number of the lot was misdescribed; but such conveyance will not include both lots even though they are annexed together.[4]

550. Effect of Omissions in a Description.—In a description by metes and bounds the omission of one boundary-line is unimportant if there be sufficient data in other parts of the deed to show the extent and limits of the land conveyed.[5] The erroneous mention of an incident in the history of the title to a piece of land is held to have no force, as against the mention of metes, bounds, courses, distances, and visible monuments, when the question is whether the deed is sufficient in form to convey the land intended.[6]

Where parties claim through a deed which describes the property as a certain part of a block, and also by the lot numbers, they are bound to take notice of the contents of the deed, and of the fact that the property was known by the lot numbers, even though no plat was recorded at the time of the conveyance.[7]

For the purpose of locating land conveyed by metes and bounds resort may always be had to extrinsic evidence; and when uncertainty or ambiguity arises in the application of the description to the subject-matter of the conveyance, evidence of all the facts and circumstances of the transaction will be received for the purpose of ascertaining the intention of the parties. The

[1] Novotny *v.* Danforth (S. D.), 68 N. W. Rep. 749.
[2] Hollenbeck *v.* Sykes (Colo. Sup.), 29 Pac. Rep. 380.
[3] Hudson *v.* Irwin, 50 Cal. 450 [1875].
[4] Gordon *v.* Trimmier (Ga.), 18 S. E. Rep. 404.
[5] Woodward *v.* Nims, 130 Mass. 70 [1881].
[6] Sherwood *v.* Whiting (Conn.), 8 Atl. Rep. 80 [1887].
[7] Marvin *v.* Elliot (Mo.), 12 S. W. Rep. 899.

* *See* Secs. 611–615, *infra*.

sense in which the parties used the ambiguous term may be ascertained from their declared intention. The bounds and monuments which prove to be indistinctly or inaccurately set out in the deed may be established by proof that they were recognized as such by the parties. It is only when the terms of the deed as applied to the land conveyed create no ambiguity that evidence of intention is excluded.[1]

If ambiguity or imperfections exist in the description so as to render it doubtful or incapable of interpretation, reference to the general language as well as to all parts of the deed will be competent to identify the property intended to be conveyed.[2] What has been granted, the quantity specified, the boundaries named, the survey, the surrounding circumstances, the situation of the parties, and the object they had in view, are all competent evidence and are to be considered in order to ascertain the true intention of the parties.[3] No direct evidence of intention can be given to *contradict* a description in a deed, but the court may allow any evidence that will put the court in the position of the parties, so as to better understand the written description. If a description can be interpreted with the aid of such testimony, it will stand and the conveyance be good; if not, the deed will be void for uncertainty. The courts have allowed evidence of surrounding facts and circumstances, where there was a clear repugnance between two descriptions of the same premises in the same deed, in order to ascertain which is most definite and certain.[4]

Where the parts of a description in a deed are inconsistent with each other, effect should be given to those consistent and intelligible portions which carry out the intentions of the parties, and what is repugnant thereto may be rejected.[5] The decisions have gone so far as to hold that it was not necessary to describe by boundaries, courses, or distances, or by reference to monuments, but to describe it only so that the property might be identified.

In an action involving the location of a boundary-line between two city lots, evidence that all the lots in the block are of uniform width, and that the boundary claimed by defendant would render plaintiff's lot six feet narrower than any other lot in the block, was held to sustain a verdict in plaintiff's favor.[6]

[1] Chester Emery Co. *v.* Lucas, 112 Mass. 424 [1873]; Waterman *v.* Johnson, 23 Pick. 261; Sargent *v.* Adams, 3 Gray 72; Putnam *v.* Bond, 100 Mass. 58; Cook *v.* Babcock, 7 Cush. 526; Stoops *v.* Smith, 100 Mass. 63.

[2] Thayer *v.* Fenton, 108 N. Y. 394 [1888]. *See* Tyler on Boundaries 124, 284, 285.

[3] Cavazos *v.* Trevino, 6 Wallace 773; Elliott *v.* Gilchrist (N. H.), 9 Atl. Rep. 382 [1887]; Piper *v.* Connolly, 108 Ill. 646 [1884].

[4] Wade *v.* Deray, 50 Cal. 376 [1875]; Cassidy *v.* Charlestown Savings Bank, 149 Mass. 325.

[5] Raymond *v.* Coffey, 5 Oregon 132 [1873]; West *v.* Bretell (Mo.), 22 S. W. Rep. 705. *Semble*, Johnson *v.* Williams (Sup.), 22 N. Y. Supp. 247.

[6] Goldsborough *v.* Pidduck (Iowa), 54 N. W. Rep. 431.

551. Certain Parts of Description Omitted may be Supplied.—A description is not insufficient because it fails to state the locality, as the county or state, if it contains some identifying circumstances or fact, or some connecting link, to show where the land in question is situated. A description of property as "all that part of the west half of the northwest quarter, section 19, township 17, range 3 west, that lies south of Black Creek," neglecting to state the county and state, was held to be sufficiently clear, and that Black Creek introduced such a landmark as to create a latent ambiguity and therefore to admit of evidence to show in what county and state Black Creek crossed the section, range, and township named, and to show that the grantor claimed and cultivated the same tract.[1]

The courts take judicial notice of the United States Government surveys,[2] as of the fact that there is but one range 5 in the survey of the United States Government in what is known as the "Columbus Land District," and that such range is east.[3] If the township and range be not designated in the description and there be several sections in the county of the number given, parol evidence may be introduced to show what section was intended, since the ambiguity is latent.[4] The omission of the words "quarter of" in a deed describing the land as "known as the northwest quarter of the northwest ——, section 8, township 29, south of range 16 E., containing 40 acres," will be supplied by construction, as a palpable omission.[5]

Where a description that gave the street, the lot and block numbers, and the county, omitted to state the town or city, it was held sufficient, proof being allowed that there was no other street of the same name in any other city or town in the county named, and that the grantor was, at the time of the grant, owner of the lot demised.[6] A description, as the "west half of lot 1, N. E. (N. W. N. E.) sec. 1 F. 6 N. R. 6", is sufficient to identify the land as the W. one-half of lot 1 in the N. E. one-fourth of said section, though such lot is in fact the S. W. one-fourth of the N. E. one-fourth; the letters in the parenthesis being immaterial to the description.[7]

A course described as "41½° E." instead of "N. 41½° E." was held immaterial error when there was no uncertainty in the other courses, distances, and monuments.[8]

[1] Black *v.* Pratt Coal & Coke Co. (Ala.), 5 So. Rep. 89; Reisback *v.* Carson (Wash.), 13 Pac. Rep. 618 [1887]; Columbian Oil Co. *v.* Blake (Ind. App.), 42 N. E. Rep. 234. *See also* Dorgan *v.* Weeks (Ala.), 5 So. Rep. 581 [1889].

[2] Reisback *v.* Carson (Wash.), 13 Pac. Rep. 618 [1887].

[3] Muse *v.* Richards (Miss.), 12 So. Rep. 821.

[4] Halliday *v.* Hess (Ill. Sup.), 35 N. E. Rep. 380.

[5] Campbell *v.* Carruth (Fla.), 13 So. Rep. 432.

[6] Austrian *v.* Davidson, 21 Minn. 117 [1874]; Bird *v.* Perkins, 33 Mich. 28 [1875]; Kile *v.* Town of Yellowhead, 80 Ill. 208. *But see* People *v.* Mariposa Co., 31 Cal. 196 [1866]. *And see* Hurley *v.* Brown, 98 Mass. 545; Stoops *v.* Smith, 100 Mass. 63; Chester Emery Co. *v.* Lucas, 112 Mass. 435; Mead *v.* Parker, 115 Mass. 413; Van Brunt *v.* Day, 81 N. Y. 251.

[7] Perkins *v.* Bulkley (Ill. Sup.), 46 N. E. Rep. 733.

[8] Carr *v.* Berkley (Mass.), 14 N. E. Rep. 746 [1888]; Warden *v.* Harris (Tex.), 47 S. W. Rep. 834.

Where a recorded notice of location, in its description of a claim, erroneously referred to the "southeasterly" end of another claim, when the claim had no such boundary, and described a distance of 400 feet as "4," and gave the courses of a certain boundary-line as "northerly" and "southerly," when the courses of such line were not true north and south, and the notice correctly described the location with reference to a well-established line of another claim, and with the aid of the location stakes the lines of the claim could be easily ascertained by applying the description of the record to the stakes and monuments, it was held that the recorded description was sufficient.[1]

If, in a deed, a line is described by reference to a rock with "a vein of iron-ore," and if, where the deed was made, there was not a vein in the rock on the line universally or generally known as "a vein of iron ore," (though not in truth such a vein,) there was no such latent ambiguity in the deed as to admit parol evidence to explain its meaning and give it a construction. It is inoperative and void because the monument, without which the land described cannot be found, does not exist.[2]

552. Land Described may be Shown to have Belonged to Grantor.—In a conveyance, a description of lands by section, township, and range, without mention of the state, county, land-district, or government survey in which the lands lie, may be aided by oral testimony showing that, when the conveyance was made, the grantor owned and resided on lands, in a given county and in a certain state, which were known by the same numbers as those employed in the conveyance. Aided by such proof, and in the absence of proof that the grantor owned or claimed other lands falling within the same description, it becomes the duty of the court to pronounce the conveyance valid.[3] A memorandum of sale of "my right in B.'s (my father) estate" sufficiently describes the property; it being shown that B. owned only a homestead, which he devised in equal shares to the vendor and vendee.[4] "All the land owned by me" in a conveyance was construed to mean "all the land *now* owned by me."[5]

To determine the quantity, location, or identity of land, the court may inquire into all extrinsic facts that bear upon the subject when there is ambiguity.[6] A mistake in the lot number may not render a deed void if it can be shown that the grantor owned a lot designated by another number which otherwise answers the description, and that he did not own the lot named. Thus when he devised lot 6 in a certain section and township, when he did not own lot 6, but did own lot 3, evidence thereof was admitted to

[1] Smith *v.* Newell (C. C.), 86 Fed. Rep. 56 [1898].

[2] Cook *v.* Babcock, 7 Cush. 526; Cleveland *v.* Flagg, 4 Cush. 76, 81; Cornell *v.* Jackson, 9 Met. 150; Putnam *v.* Bond, 100 Mass. 58; Chester Emery Co. *v.* Lucas, 112 Mass. 424 [1873].

[3] Chambers *v.* Ringstaff, 60 Ala. 140.

[4] Ryder *v.* Loomis (Mass.), 36 N. E. Rep. 836.

[5] Fitzgerald *v.* Libby (Mass.), 22 Reptr. 613 [1886].

[6] Paine *v.* Upton, 87 N. Y. 337.

show that the testator had made a mistake and that lot 3 was intended instead of lot 6.[1] A similar case is reported where the conveyance called for lot 403 when the grantor did not own lot 403, but did own lot 406. It was held a plain case of error on the face of the instrument, a tripping of the pen.[2] Another case holds that if the description applies to a certain tract of land the deed cannot be reformed, so as to make it convey a different piece, on the mere fact that the grantor at the time owned the latter and not the former tract.[3]

Courts have supplied an entire call apparently omitted, as where the description read, "thence west 900 poles to county line, and with the same, to point of beginning." The 900-pole line being parallel to the county line, which was an east-and-west line, the court supplied the call "thence south to the county line," and had it inserted after the words "900 poles."[4] An apparent mistake in writing a description wherein "60 rods" was written for "160 rods" will not prevent the court from interpreting the deed as intended by the grantor, where it is shown that such a construction is necessary to make the description apply to the only land owned by the grantor in that vicinity.[5]

553. When Description Applies to Two Estates.—A grant that applies equally to two tracts may not fail for want of certainty if the evident intention of the parties can be ascertained by evidence.[6] The location may be determined by evidence of the circumstances surrounding and connected with the parties and the land at the time of the conveyance.[7] It seems that the grantee may elect as to the one to which he will claim title, and the burden is upon the grantor to show his ownership of two such tracts, and to show that the instrument was intended to convey this or that particular one.[8] This comes from a rule of construction that the language of an instrument is to be construed most strongly against the person who first used the language, which is usually the grantor.[9]

Where the monuments established by a plat are those fixed by the government survey, and those making the dedication in the actual location of the lines of the plat included within the lines of private property a strip of land

[1] Patch *v.* White, 117 U. S. 210.

[2] Kertz *v.* Hibner, 55 Ill. 514; Crooks *v.* Whitford, 47 Mich. 383, 8 East 149, 7 H. L. 364, 36 Ia. 674, 10 Amer. Law Reg. (N. S.) 93, 353.

[3] Kellogg *v.* Hastings, 70 Ill. 598 [1873].

[4] Hitchcock *v.* Southern I. & T. Co. (Tenn.), 38 S. W. Rep. 588; Woodward *v.* Nims, 130 Mass. 70[1881].

[5] Presnell *v.* Headley (Mo.), 43 S. W. Rep. 378 [1897]. *See also* Blount *v.* Bleker (Tex.), 35 S. W. Rep. 863.

[6] Clark *v.* Powers, 45 Ill. 283 [1867]. *See* Lente *v.* Clark (Fla.), 1 So. Rep. 149 [1887]; Hurley *v.* Brown, 98 Mass. 545; Mead *v.* Parker, 115 Mass. 413.

[7] Scates *v.* Henderson (S. C.), 22 S. E. Rep. 724; Fudickar *v.* East Riverside Irr. Dist. (Cal.), 41 Pac. Rep. 1024; Simpson *v.* Blaisdell, 85 Me. 199.

[8] Lente *v.* Clark, *supra*.

[9] Marshall *v.* Niles, 8 Conn. 369; Ryan *v.* Wilson, 9 Mich. 262. For a case where the contention was as to which fork or branch of a stream was intended, or which bore the name employed, in a description, *see* Bassett *v.* Martin (Tex.), 18 S. W. Rep. 587.

which, according to the true location, is within the boundaries of the street, the government monuments prevail.[1]

A call "thence . . . to a stake on the top of Looney's Ridge," followed by a call "and with the same N. 88°, E. 422 poles to a stake," was held to require the last line to run with the top of the ridge, such natural boundary prevailing over the courses and distances in case of conflict.[2]

In an action in which the question was the correct location of the northeast corner of section 3, it appeared that B., a surveyor, found what he considered the corner-stone in a public road, which defendant contended was on the section-line between sections 2 and 3, and that plaintiff contended such corner was about 25 rods east of such stone. There was evidence that such road was not, and no evidence that it was, located on the section-line. Held not error to refuse to charge that a long-established road is better evidence of actual boundary settled by practical location than any survey made after the monuments of the original survey have disappeared.[3]

A description of a tract in a deed as composed of the parcels conveyed in six different deeds of land lying on a certain creek cannot be aided by parol evidence as to the identity of the parcels referred to, even if it would be competent to offer six grants and prove that they were located on the creek mentioned.[4]

Parol evidence is admissible to locate a tree called for by a grant as the beginning corner, at the northeast corner of the lot referred to in the grant, instead of the southeast corner described therein, although it is not permissible to contradict and change the call itself, but only the description of its location.[5]

A description of land in proceedings for its sale in an action by a creditor, as "running from the N. E. corner of the S. E. ¼ of section 21 due west to the N. W. corner of the S. E. ¼ of section 21 to a stake, and from thence south," is not ambiguous so as to authorize the admission of parol evidence that there was no stake at the northwest corner of such quarter-section, but that the stake intended was at the northwest corner of the east half of such quarter-section.[6]

Parol evidence is admissible to show what was really conveyed by a deed, under the rule of law that courses and distances must yield to known objects.[7]

554. Land Described by Familiar Name in Community.—An estate or building described by some name well known and notorious will be sufficient if its limits can be exactly defined; e.g., a building described as "On the

[1] Brown *v.* City of Carthage (Mo. Sup.), 30 S. W. Rep. 312.
[2] Clarkston *v.* Va. C. & I. Co. (Va.), 24 S. E. Rep. 937. *See* Gentile *v.* Crossan (N. M.), 38 Pac. Rep. 247.
[3] Woodbury *v.* Venia (Mich.), 72 N. W. Rep. [1897].
[4] Hemphill *v.* Annis (N. C.), 26 S. E. Rep. 152.
[5] Davidson *v.* Shuler (N.C.), 26 S. E. Rep. 340.
[6] Donehoo *v.* Johnson (Ala.), 21 So. Rep. 70.
[7] Broaddus *v.* Eubanks, 18 Ky. L. Rep. 742, 38 S. W. Rep. 134.

corner of Main and Monroe streets in Peoria, known as Post-office Corner";[1] or premises designated as "Pelican Beach near Barren Island";[2] or described as "lot 36 in the town of Webb," in a deed dated at Webb, Miss., describing the grantor as being of Tallahatchie County.[3]

A description by metes and bounds is not necessary where the premises are well known by name.[4] If the property be described by numbers or by metes and bounds, extraneous and parol evidence may be admitted to ascertain whether a particular piece of property, definitely described and ascertained, constitutes a "margin" or "basin."[5]

To determine whether or not the renting of a house included the ground-floor, which was a store,[6] evidence of extrinsic facts should be admissible to ascertain whether the parties intended to include the store in the term "house." If knowledge of intention will aid in interpreting the words used, it should be admitted.[7]

Parol evidence is admissible to show that at the time of the conveyance a particular line referred to in a deed was generally recognized by the name used in the deed and in the community.[8]

554a. Land Described as a Part of a Whole.*—In an agreement to convey a piece of land described as "five acres, lot 3, section 23," etc., there being nothing to show which five acres were intended, it was held to be a case in which evidence could not be introduced to supply the defect in the description.[9]

A deed describing the land conveyed merely as so many acres to be taken by the grantee from a larger tract, wherever he may select, is not void for uncertainty;[10] but one describing land as "two-thirds" of certain lots, without identifying what particular two-thirds was intended, is void.[11]

A description of "1377 acres of land, situated in the county of Young, in the state of Texas, surveyed and patented by virtue of my head-right certificate," is not void for uncertainty on its face, as, so far as the deed discloses, the entire tract may have contained only 1377 acres.[12] A description in a deed as the "west part, N. E. quarter, N. W. quarter, twenty acres," of a certain section, is sufficiently definite, the words "twenty acres" show-

[1] Grier *v.* Puterbaugh, 108 Ill. 602.
[2] Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229 [1883].
[3] Wilkerson *v.* Webb (Miss.), 23 So. Rep. 180 [1898].
[4] Lenning's Ex'rs *v.* White (Va.), 20 S. E. Rep. 831.
[5] Indiana Cent. Canal Co. *v.* State, 53 Ind. 575 [1876].
[6] Sargent *v.* Adams, 3 Gray 72; Chester Emery Co. *v.* Lucas, 112 Mass. 435; Mead *v.* Parker, 115 Mass. 413; 1 T. R. 701.
[7] Stoops *v.* Smith, 100 Mass. 63.
[8] Hanlon *v.* Union Pac. Ry. Co. (Neb.), 58 N. W. Rep. 590; Grier *v.* Puterbaugh, 108 Ill. 602 [1884].
[9] Nippolt *v.* Kammon (Mich.), 40 N. W. Rep. 266 [1889].
[10] Dohoney *v.* Womack (Tex.), 20 S. W. Rep. 950, *affirming* 19 S. W. Rep. 883.
[11] Mutual B. & L. Assn. *v.* Wyeth (Ala.), 17 So. Rep. 45; Voorheis *v.* Eiting (Ky.), 22 S. W. Rep. 80; Nelson *v.* Abernethy (Miss.), 21 So. Rep. 150; George *v.* Bates (Va.), 20 S. E. Rep. 828.
[12] Slack *v.* Dawes (Tex.), 22 S.W. Rep. 1053.

* *See* Sec. 546, *supra*, and Sec. 558, *infra*.

ing the words "west part" to mean "west half."[1] There is no objection to a description of land as the "south one-fourth" or "the south 10 acres" of a government subdivision.[2] A description by metes and bounds *less 25 acres off the south side* was held to require that a parallelogram with the south line as the base be deducted.[3] A deed which conveys "78 rods off the south side of the northwest quarter" of a section describes a certain fractional part of the quarter, 78 rods wide, on the south side, extending along the entire length.[4]

A description reading, "a lot 60 feet wide on M. street and 128.90 feet deep, being the north end of lot 293 in the village of M.," is sufficient.[5]

In a deed of the "east half" of a fractional quarter-section, the words "east half" refer to the government subdivision of the quarter-section, and not to a subdivision of the quarter-section by a line dividing it into two equal parts.[6]

If a conveyance of an undivided half of a tract of land, identified as coming from a particular conveyance, be made, the grantee cannot by this description take the other half even though the half so identified proves to be subject to a mortgage.[7]

"Parcels" as applied to land was held to mean "portions."[8]

555. Insufficient Description Cured by Reference to a Map or Deed.—Descriptions that would be insufficient are frequently rendered certain by reference to some other deed, map, or instrument of record; but such reference should be explicit, and if the conveyance is to be according to the map or description contained in some earlier record, the deed should make that fact clear. A general reference after a particular description goes for naught. Conveyances are frequently made certain by reference to the land as being the same as was conveyed to the grantor by some prior conveyance. Such references frequently correct mistakes made in transcribing the title-deeds. A deed describing property conveyed as "all that certain interest in the landed estates of H. and M., deceased, to which we may be entitled by gift, devise, or descent, or otherwise," is sufficient.[9]

When the land in controversy, described in a sheriff's deed, was incapable of identification without reference to a map, and there were two maps which

[1] Soukup *v.* Union Inv. Co. (Iowa), 51 N. W. Rep. 167.

[2] McCartney *v.* Dennison (Cal.), 35 Pac. Rep. 766; Owen *v.* Henderson (Wash.), 47 Pac. Rep. 215; Bassett *v.* Sherrod (Tex.), 35 S. W. Rep. 312. *But see* Nelson *v.* Abernethy (Miss.), 21 So. Rep. 150.

[3] Watson *v.* Crutcher (Ark.), 19 S. W. Rep. 98; Gress Lumb. Co. *v.* Coody (Ga.), 21 S. E. Rep. 217; Tierney *v.* Brown (Miss.), 5 So. Rep. 104 [1889].

[4] Cobb *v.* Taylor (Ind. Sup.), 33 N. E. Rep. 615. *And see* People *v.* Storms, 97 N. Y. 364 [1884].

[5] Hoban *v.* Cable (Mich.), 60 N. W. Rep. 466.

[6] Turner *v.* Union Pac. Ry. Co. (Mo. Sup.), 20 S. W. Rep. 673.

[7] Bailey *v.* Knapp (Me.), 9 Atl. Rep. 356 [1887].

[8] Johnson *v.* Sirret (Sup.), 31 N. Y. Supp. 917.

[9] Harris *v.* Broiles (Tex.), 22 S.W. Rep. 421.

answered the description equally well, neither of which was ever filed with the county recorder, testimony of the sheriff as to which map he referred to in the deed was held inadmissible.[1] An erroneous or uncertain description in a notice of a judicial sale, or in a deed given pursuant thereto, will avoid the sale.[2] An exception, in a deed, which reads, "Except the dower of fifty acres, as fully described in a deed given to C. B. Co." was held not void, as reference could be had to the deed of C. B. Co.[3] A deed describing the land conveyed as all the land which the grantor owned, or in which he had an interest, in a particular county, is sufficient, as to description, as to all land of the grantor in such county.[4] *

The words, "all my right, title, and interest in and to all real estate situated in Hope, Warren, and Union," convey the grantor's whole estate situated in the towns named; and a clause following, "meaning to convey all my right, title, and interest in the real estate formerly occupied by me," does not limit the grant to such premises as the grantor had occupied, but only insures their inclusion in the grant.[5]

Land is sufficiently described in a conveyance if the deed refers for identification to another deed, map, or other instrument, specifically mentioned therein, which contains an accurate description of the property sold.[6] † An imperfect description is often cured by reference to another deed in which the land is correctly described.[7]

A deed describing land as the grantor's "right, title, and interest in the estate of J. W. B., purchased by me at administrator's sale," was held not void for want of sufficient description when read in connection with the deed from the administrator to the grantor.[8] Nor was a deed held void for want of sufficient description when it described a conveyance as "of all the right, title, and interest in and to all the lands purchased from R. as may more fully appear by the legal transfer of the sale";[9] or as "the tract left me by P. and adjoining lands of H. S. and others containing 180 acres more or less";[10] or

[1] Cadwalder *v.* Nash (Cal.), 14 Pac. Rep. 385 [1887].

[2] *See* Herrich *v.* Merritt (Minn.), 33 N. W. Rep. ; Helmer *v.* Rehm (Neb.), 15 N. W. Rep. 344; Burrows *v.* Gibson (Mich.), 3 N. W. Rep. 293; Chalmers *v.* Brown (Tex.), 2 S. W. Rep. 518; Allday *v.* Whittaker (Tex.), 1 S. W. Rep. 794; Pfeiffer *v.* Lindsay (Tex.), 1 S. W. Rep. 265.

[3] McAfee *v.* Arline (Ga.), 10 S E. Rep. 441; Sulphur Mines Co. *v.* Thompson's Heirs (Va.), 25 S. E. Rep. 232.

[4] Brigham *v.* Thompson (Tex.), 34 S. W. Rep. 358; Curdy *v.* Stafford (Tex.), 30 S. W. Rep. 551; Cox *v.* Hart, 12 Sup. Ct. Rep. 962; Threadgill *v.* Bickerstaff (Tex.), 29 S. W. Rep. 757; Hermann *v.* Likens (Tex.), 39 S. W. Rep. 282; McAllen *v.* Raphael (Tex.), 32 S. W. Rep. 449. *And see* Knowles *v.* Bean, 87 Me. 331; Steelman *v.* Atl. City Sew. Co., 38 Atl. Rep. 742; Perry *v.* Scott (N. C.), 14 S. E. Rep. 294.

[5] Hobbs *v.* Payson, 85 Me. 498.

[6] Rupert *v.* Penner (Neb.), 53 N. W. Rep. 598; Jay *v.* Michael (Md.), 35 Atl. Rep. 322; Campbell *v.* Morgan (Sup.), 22 N. Y. Supp. 1001.

[7] Leake *v.* Caffey (Miss.), 19 So. Rep. 716.

[8] Vineyard *v.* O'Connor (Tex.), 35 S. W. Rep. 1084.

[9] Clipper *v.* Sage (Tex.), 37 S. W. Rep. 363; Graham *v.* Botner (Ky.), 37 S. W. Rep. 583.

[10] Walker *v.* Moses (N.C.), 18 S. E. Rep. 339.

* *See* Sec. 552, *supra.*

† *See* Sec. 549, *supra.*

as "—— acres out of the S. W. side of the C. N. Bassett survey of 292 and 640 acres in Brown County";[1] or as "being the land that was willed to me by my father";[2] or as "one-half of all one's estate";[3] or as a patent of all the land within certain boundaries, "excluding all those surveys to which there is now a lawful title."[4]

A clause in a deed, at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," etc., does not either enlarge or limit the grant.[5] *

Where the description in a deed refers to a map, and describes the property by metes and bounds, starting from a certain stake, and where it is shown that the map is inaccurate and not made from an actual survey, that it has no scale or starting-point, and does not represent the territory which it purports to include, the true location of the land which the grantor intended to convey and the grantee to purchase may be shown by parol evidence; the reference to the map being treated as surplusage.[6]

Where a deed for the transfer of land misdescribes the tract intended to be conveyed, and the grantors execute a second deed to correct the description of the first, both instruments are admissible to show the ownership of the land in the grantee.[7]

556. Grantee or Devisee Uncertain.—If there be uncertainty as to which of the persons is the grantee or devisee, testimony may be given as to the grantor's acquaintance, relationship, etc., to the parties to ascertain which of the parties was intended.[8] This is true only when the description applies equally to both persons; if it applies exactly to one person and imperfectly to another, then no evidence will be admissible. The grant will go to the party who answers best the description.[9] If a devise be a gift to a society for charitable purposes and the description apply to two different societies equally, it may be divided between the two, since the gift was for a certain object and that object will be accomplished thereby.[10]

A deed of land known as the "W. Homestead," 200 acres, more or less, bounded by the lands of certain persons named, "and of others," may be explained by the grantor so as to identify the land and show the names of the "others," adjoining owners.[11]

[1] Bassett *v.* Sherrod (Tex.), 35 S. W. Rep. 312. *But see* Edens *v.* Miller (Ind.), 46 N. E. Rep. 526.
[2] Beaty *v.* Dozier (Ky.), 34 S. W. Rep. 524; Blakely *v.* Quinlan (Ky.), 39 S. W. Rep. 513.
[3] Roehl *v.* Haumeier (Ind.), 15 N. E. Rep. 345 [1888].
[4] Ballowe *v.* Hillman (Ky.), 37 S. W. Rep. 950.
[5] Smith *v.* Sweat (Me.), 38 Atl. Rep. 554 [1897].
[6] Cleveland *v.* Choate (Cal.), 18 Pac. Rep. 875 [1888].
[7] Arn *v.* Mathews (Kan.), 18 Pac. Rep. [1888].
[8] Grant *v.* Grant, 5 C. P. 727.
[9] McKilvert's Trusts (Eng.), 7 Ch. 170; Waring *v.* Ayers, 40 N. Y. 357. *And see* 27 W. Rep. 392.
[10] McKilvert's Trusts (Eng.), 7 Ch. 170.
[11] Rapley *v.* Klugh (S. C.), 18 S. E. Rep. 680.

* *See* Secs. 547–549, *supra*.

557. Intention of Parties will Prevail if it can be Ascertained from Deed.—In interpreting descriptions of land conveyed, it should be borne in mind that *it is the intention* of the parties as expressed in the conveyance that will prevail. If the intention be clear, it will hold even though the parties have given an incorrect specific description.[1] If the description be sufficient to ascertain the estate intended to be conveyed, although the estate does not agree with some of the particulars in the description, yet it will pass by the conveyance, that the *intent* of the parties may be effected.[2]

No mistake in the description of the land conveyed will vitiate the deed if the description be sufficient to ascertain the land intended to be conveyed, although the land does not agree with some of the particulars in the description.[3] Thus it frequently happens that courses and distances do not agree with the monuments referred to, and that mistakes occur as to the ownership of the land on which the granted premises abut. In all such cases the courses and distances will be controlled by the monuments, and other mistakes will be disregarded if the whole description be such as to ascertain the intention of the parties with reasonable certainty.[4]

Where a deed conveying land "bounded and described according to" a certain survey does not call for a river, but calls for a line run between certain points designated by the surveyor, as on the bank of a navigable river, but where it appears that the lines of such survey excluded flats between high-water and low-water marks, evidence *aliunde* is admissible that the bank referred to was an artificial dike; that the grantee had notice that the grantors reserved the flats; that the grantors refused to execute a deed expressly conveying the flats; and that the sale was expressly subject to a survey,—such evidence tending to show that the flats were excluded, whatever may be the presumption from the deed.[5]

558. When Evidence of Intention of Parties is Admissible.—In general no direct evidence of intention will be admitted to render a description certain; and if extrinsic evidence of the attendant circumstances of the grant or devise, of the relations of the parties, and of the object in view will not render the description certain, then it must fail for insufficiency. If ambiguity exists, the court will inquire into all extrinsic facts that bear upon the subject to determine the parties, or the quality, quantity, location, or identity of the subject-matter. If the uncertainty be so evident as to render the interpretation and understanding of the description hopeless, then the court will declare it void for uncertainty. Where there is a manifest mistake in the calls of a deed or patent, the plat and certificate of survey may be referred to to determine the boundary.[6]

[1] Worthington *v.* Hilyer, 4 Mass. 196.
[2] Bosworth *v.* Sturtevant (Mass.), 2 Cush. 392; Pierce *v.* Brown, 24 Vt. 165 [1852].
[3] Worthington *v.* Hilyer, 4 Mass. 196.
[4] Clark *v.* Munyan (Mass.), 22 Pick. 410 [1839].
[5] Palmer *v.* Farrell (Pa.), 18 Atl. Rep. 761.
[6] Patrick *v.* Spradlin (Ky.), 42 S. W. Rep. 919 [1897].

In another case, in which a piece of land was described as the N. W. quarter, section 32, which should have read the S. E. quarter, section 33, evidence was offered by the scrivener that the testator told him to write it N. W. quarter, section 33, and that he had made the mistake, and it was held that this was direct evidence of intention and was not admissible. You may omit certain parts if it leaves the description complete, but you may not add to or change the written instrument.[1] Statements of the scrivener of the deed, as to what the parties directed him to do at the time of drawing the deed, are not admissible to show which of two lots of land was intended by the description.[2] A mistake in a description which is common to the parties and to the scrivener, by reason of which land intended to be mortgaged was imperfectly described, was held to be a mistake of fact and not of law.[3] Extrinsic evidence is always admissible to *explain* a deed or sealed instrument, but extrinsic evience to *vary or change* a deed is not admissible. In a description of land by monuments as "to the mountain, or parallel with the mountain," where several lines could be located, the court said it was impossible to explain the deed acceptably. It was admitted that if the shortest distance between the two points were adopted, only one point could be determined. The higher court held the line to a mountain to be the shortest line. It was decided upon a principle of construction in this case and not upon the evidence. The document had a clear meaning, and therefore no amount of evidence could change it.[4]

559. Conveyances Not Located Give Undivided Interest.—The description must be so certain that the property conveyed can be identified without the aid of extrinsic evidence.[5] A deed of a certain number of acres of a tract described is not void for uncertainty, but conveys a proportionate undivided interest;[6] but a conveyance in fee of "the undivided fourth" of certain lands was held uncertain.[7] A deed describing the land as all the undivided interest which the grantor had in 30 acres out of a certain survey was held insufficient.[8]

A sheriff's deed describing the land as "426⅔ acres of land out of the S. W. side of the C. N. Bassett survey, No. 292, of 640 acres, in Brown county," was held void for want of sufficient description.[9] If no attempt be

[1] Kurts *v.* Hibner, 55 Ill. 514. *But see* Guardhous *v.* Blackburn, L. R. 1 P. & D. 109; Drew *v.* Smith, 46 N. Y. 204–210.

[2] Madden *v.* Tucker, 46 Me. 367 [1857]; Riggs *v.* Myers, 20 Mo. 439, leading case. *Contra*, Creasey *v.* Alverson, 43 Mo. 13–21, where evidence was admitted to show what land the testator owned, and as to what testator intended. *See* Fitzgerald *v.* Libby (Mass.), 22 Reptr. 613 [1886].

[3] Whipperman *v.* Dunn (Ind.), 24 N. E. Rep. 1045 [1890].

[4] Best *v.* Hammond, 55 Pa. St. 409. *And see* Black *v.* Bachelder, 120 Mass. 171.

[5] Sulphur Mines Co. *v.* Thompson's Heirs (Va.), 25 S. E. Rep. 232; Lowe *v.* Harris (N. C.), 17 S. E. Rep. 539; Richardson *v.* Pavell (Tex.), 19 S. W. Rep. 262; Mizell *v.* Ruffin (N. C.), 18 S. E. Rep. 72.

[6] Linnartz *v.* McCulloch (Tex.), 27 S. W. Rep. 279.

[7] Ford *v.* Unity Ch. Soc. (Mo.), 25 S. W. Rep. 394.

[8] Gallagher *v.* Rahm (Tex.), 31 S. W. Rep. 327. *And see* Steelman *v.* Atl. City S. Co. (N. J.), 38 Atl. Rep. 742.

[9] Bassett *v.* Sherrod (Tex.), 35 S. W. Rep. 312.

made to locate the land, but the conveyance be a deed or devise of a certain number of acres out of a larger tract, it may pass an undivided interest in the entire tract.[1]

Where a deed describes the land conveyed as all of a certain league, excepting therefrom certain tracts, and the tracts excepted cannot be located, the deed is void for uncertainty. If it convey a certain number of acres of the unsold part of a certain league, to be a square form, or as near thereto as practicable, beginning at a certain place, and it is impossible to locate a tract of such shape without including therein tracts previously sold, the deed is void for uncertainty.[2]

560. Signs, Symbols, and Abbreviations in Descriptions.—Descriptions that are in language and signs peculiar to engineers and surveyors, and which have been incorporated into a deed, are not void for uncertainty if they can be identified and located by a competent surveyor with reasonable certainty, either with or without extrinsic evidence.[3]

If the language employed in the instrument be technical, evidence may be introduced to interpret or explain the meaning of the words, signs, abbreviations, or diagrams employed.[4] Evidence of custom and usage is also explanatory evidence and will be admitted, as, e.g., the customs of surveyors or of localities.[5] Thus a description of land as "S. ½, ex. W. 12 rods of E. 40 rods, of N. ½ and N. 10 rods, S. 13 rods, of E. 28 rods of N. ½ of N. W. ¼ of sec. 23, etc., $74\frac{64}{100}$ acres," was held sufficient, and one as "N. side N. ½ S. E., N. W. 10 acres sec 8. T. 23 R. 10, quantity sold 10 acres," was held not void for uncertainty.[6] The introduction of evidence to show that "degrees" should have been written "perches" in a deed has been denied.[7]

Figures printed across a street on a map, without any sign to indicate what the numbers stand for, sufficiently designate the width of the street if the scale of the map shows that the number was intended to represent feet.[8]

561. Judicial Notice of Meaning of Abbreviations, etc.—Courts will often take judicial notice of the meaning of such initials and the abbreviations used, without proof; and of lines and subdivisions, their position and location with reference to other lots, subdivisions, and lines; and of the fact that the south line of a section and the south line of a township are one and the same line, that there is no township of a certain number south in the county, and that therefore the township referred to is north.[9] They have also taken

[1] Byrn *v.* Kleas (Tex.), 39 S. W. Rep. 980.
[2] Dwyre *v.* Speer (Tex.), 27 S. W. Rep. 585.
[3] Law *v.* People *ex rel.*, 268.
[4] Best's (Chamb.) on Evidence 231.
[5] Best's (Chamb.) on Evidence 231. *See* Black *v.* Bachelder, 120 Mass. 171.
[6] Taylor *v.* Wright (Ill.), 13 N. E. Rep. 529 [1887]. *And see* Tierney *v.* Brown (Miss.), 5 So. Rep. 104 [1889]; Adams *v.* Harrington (Ind.), 14 N. E. Rep. 603 [1888].
[7] Clarke *v.* Lancaster, 36 Md. 196 [1872].
[8] Gaffney *v.* City of S. F., 72 Cal. 146 [1887].
[9] Kile *v.* Town of Yellowhead, 80 Ill. 208 [1875].

notice of the fact that the magnetic needle varies from the true north.[1]

Judicial notice has been taken of facts in connection with boundaries, geographical subdivisions, names of counties, cities, etc., and in connection with navigable waters.[2]

562. Poor Spelling and Grammatical Errors in Description. — Poor spelling and grammatical inaccuracies cannot render a description insufficient if the clear and evident understanding of the parties can be ascertained. Thus where a deed described the land conveyed as "a biece of land aboot 100 feet long or wide," and further described it by metes and bounds, and the land was at the date of conveyance fenced and known to the purchaser, the description as to metes and bounds controls the statement as to quantity.[3]

Parol evidence is admissible to show that the name "Henry Pulling," designating the beneficiary in a grant of land, and the name "Henry Pullen," designating the grantor in a deed of the same land, described one and the same person.[4]

[1] Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91.

[2] 12 Amer. & Eng. Ency. Law 174. *See* judicial notice as to differences of time, navigability of streams, variations of needle, telephones, etc., 12 Amer. & Eng. Ency. Law 196, *and* Wait's Engin. & Arch. Jurisp., § 892a; Best's Evidence (Chamb.-Ed.) 262.

[3] Thompson *v.* Sheppard (Ala.), 5 So. Rep. 334 [1889]; Sloan *v.* Thompson (Tex.), 23 S. W. Rep. 613.

[4] Hicks *v.* Ivey (Ga.), 26 S. E. Rep. 68.

CHAPTER XXX.

DESCRIPTION. CONFLICT OF CALLS.

571. Governing Factors in Description—That which is Most Certain will Control.—Different parts of a description are sometimes in conflict and irreconcilable, and it becomes a question of law as to which shall predominate. Numerous rules of construction have been laid down, but probably none is more firmly established than that monuments control all other parts. This rule is founded upon the general rule of construction that "that which is most certain should control"; or in other words, "When there is conflict between descriptions in a deed, that description is to be adopted which is the least likely to be affected by mistakes."[1] If both descriptions of the deed are of equal authority, that one which is most favorable to the grantee must be adopted.[2] The reason and justice of this rule are explained in the numerous opinions delivered from the bench and which have been handed down from the earliest records. The rule that what is most material and certain shall control that which is less material and uncertain is supported by common sense.[3]

The ordinary variations of the needle by local attraction, the imperfections of the instruments used in surveying, or unskillfulness in their use, the inequalities of the ground, the expansion and contraction of tapes and chains due to heat and cold, the wearing and stretching of the joints of chains, are all elements of error and uncertainty which do not belong to monuments and which in the estimation of courts make courses and distances secondary to fixed monuments. If to these considerations we add the ignorance or carelessness of the scrivener in expressing the meaning of the parties, which is often apparent on the face of a deed, we shall find that the acts of the parties in pointing out, running, marking, or locating a line are more likely to dis-

[1] Vance *v.* Fore, 24 Cal. 437 [1864]; New York & T. Land Co. *v.* Votaw, 14 Sup. Ct. Rep. 1.

[2] Vance *v.* Fore, 24 Cal. 436 [1864].

[3] Bowman *v.* Farmer, 8 N. H. 402; Doe *v.* Thompson, 5 Cowen 371; Colter *v.* Mann, 18 Minn. 96 [1871]; Myers *v.* Ladd, 26 Ill. 414; Lincoln *v.* Wilder, 29 Me. 169; Benedict *v.* Gaylord, 11 Conn. 333; Jackson *v.* Camp, 1 Cowen 605; Jackson *v.* Wendell, 5 Wend. 142; Fenley *v.* Flowers (Tex.), 23 S. W. Rep. 749; Raymond *v.* Coffey, 5 Oregon 132; 1 Greenleaf on Evidence, § 301; 3 Washburn on Real Property 344–353.

close their intention as to where the line should be, when the deed was given, than courses or distances put down on paper.[1]

When the boundaries of land are fixed, known, and unquestionable, the monuments must govern although neither courses nor distances, nor the computed area, correspond. Because of errors in surveying instruments, variations of the needle, and other causes surveyors often disagree with respect to courses. The same observations apply to disagreements arising from the inaccuracies of measures or of the party measuring; and computations made from the field operations are often erroneous. Fixed monuments remain; about them there should be no uncertainty, and what may be uncertain must be governed by that which is fixed.

In all cases of contradiction between the parts of a description, that element will control about which there is the least likelihood of mistake.[2]

572. The Intention of Parties will Prevail.—Though the rule that monuments govern courses, distances, and acres is generally the accepted principle of construction and is almost universal, yet it is modified and controlled by the evident *intention* of the parties. If the facts gathered from the instrument show conclusively that the parties *intended* some particular or inferior element to control, the rule must give way, that such intention may be carried out.[3] The first inquiry, then, in construing a deed is, "What was the *intention* of the parties?" This is to be ascertained primarily from the language of the deed. The court will not travel out of the four corners of the paper, if the instrument affords a clear and certain interpretation; but if the intention be doubtful, then the judge may at his discretion admit extrinsic evidence to assist in the full understanding of the parties' relations.[4] If a description is so clear, unambiguous, and certain that the intention of the parties may be gathered from its terms, it will control. The object of the law is to ascertain and discover the intention of the parties, and, when this can be done, to carry the intention into effect.[5] It is the intention, when ascertained, which governs, and all the language must be considered.[6]

The question of what was the grantor's intention should be submitted to the jury without abstract instructions as to rules and presumptions which determine whether calls for course and distance, or calls for unmarked lines and corners of adjacent surveys, shall control. The intention is to be gathered from all the facts and circumstances in evidence.[7] An instruction

[1] Knowles *v.* Toothaker, 58 Me. 172.

[2] 2 Amer. & Eng. Ency. Law 499, *and cases cited.*

[3] Thayer *v.* Finton, 108 N. Y. 394; Holland *v.* Thompson (Tex.), 35 S. W. Rep. 19; Cadeau *v.* Elliott (Wash.), 34 Pac. Rep. 916; Robertson *v.* Mooney (Tex.), 21 S. W. Rep. 143; Roberts *v.* Helms (Tex.), 20 S. W. Rep. 1004.

[4] Kock *v.* Dunkel, 9 Pa. St. 264 [1879].

[5] Thayer *v.* Finton, 108 N. Y. 394; Grandin *v.* Hernandez, 29 Hun 399, 203; Bridges *v.* Pierson, 45 N. Y. 601, 604; Morris *v.* Ward, 36 N. Y. 587, 592; Keith *v.* Reynolds, 3 Grenl. 393; Lodge *v.* Lee, 6 Cranch 237; Ousby *v.* Jones, 73 N. Y. 621.

[6] Grandin *v.* Hernandez, 29 Hun 403; Smith *v.* Horn (Pa.), 31 Atl. Rep. 1078.

[7] Holland *v.* Thompson (Tex.), 35 S. W. Rep. 19.

merely defining the dignity of the different calls in the patent, namely, artificial and natural objects, calls, and distances, should not be given, as it becomes a charge on the weight of the evidence.[1]

573. Controlling Factors when Intention is Not Clear—Monuments Control.—As Chief Justice Cooley of Michigan has said: "No rule in real-estate law is more inflexible than that monuments control courses and distances—a rule frequently applied in case of public surveys, where its propriety, justice, and necessity are never questioned."[2] Fixed and known monuments or objects, called for in a description of a deed, must prevail over given courses and distances; the order of application being, *first*, to natural objects; *second*, to artificial marks; and, *third*, to courses and distances.[3]

The highest and best evidence of the location of a tract of land is that furnished by the monuments found on the ground and which have been made for that particular tract. If found or located on the ground, that is the best evidence of the location of the tract, and then it matters not what the calls are, what the lengths of the lines are, or what their courses. The boundary-lines go from one monument to another if they can be found. When monuments cannot be found, the calls should be resorted to, and it is the duty of the surveyor to go upon the ground and run the lines according to these calls.[4] The line originally run, fixed, and marked is the true boundary-line that will control irrespective of any mistakes or errors in running and marking the line; and this is true of boundaries between states and nations as well as of those of estates.[5] Monuments and lines, actually run, control boundaries shown upon a map or plat when lots have been sold according to the num-

[1] Huff *v.* Crawford (Tex.), 34 S. W. Rep. 606.

[2] Diehl *v.* Zanger, 39 Mich. 601 [1880]. Monuments govern courses and distances. Taylor *v.* Fomby (Ala.), 22 So. Rep. 910; Hurlbutt *v.* Butenop, 27 Cal. 57; Stinchfield *v.* Gillis (Cal.), 40 Pac. Rep. 98; Stoll *v.* Beecher (Cal.), 29 Pac. Rep. 327; Los Angeles F. & M. Co. *v.* Thompson (Cal.), 49 Pac. Rep. 714; Quillen *v.* Betts (Del.), 39 Atl. Rep. 595 [1897]; Meydenbauer *v.* Stevens (D. C.), 78 Fed. Rep. 787; Myers *v.* Ladd, 26 Ill. 415; England *v.* Vandermark (Ill. Sup.), 35 N. E. Rep. 465; Logan *v.* Evans (Ky.), 29 S. W. Rep. 636; Sawyer *v.* Kendall, 10 Cush. 241; Pejepscut Proprietors *v.* Ransom, 14 Mass. 144; Olson *v.* Keith (Mass.), 39 N. E. Rep. 410; People *v.* Auditor-General, 7 Mich. 96; Brown *v.* Morrill (Mich.), 51 N. W. Rep. 700; Yanish *v.* Tarbox (Minn.), 51 N. W. Rep. 1051; Burnham's Heirs *v.* Hitt (Mo.), 45 S. W. Rep. 368 [1898]; Greenleaf *v.* Brooklyn E. R. Co., 8 N. Y. Supp. 30, *a ditch;* Muhlker *v.* Ruppert, 124 N. Y. 627 [1891]; People *v.* Jones, 112 N. Y. 597 [1889]; Lush *v.* Druse, 4 Wend. 313; Curtis *v.* Aronson (N. J.), 7 Atl. Rep. 886; Hopper *v.* Justice (N. C.), 16 S. E. Rep. 626; Anderson *v.* McCormick (Oreg.), 22 Pac. Rep. 1062; Lewis *v.* Lewis, 4 Oregon 177; Raymond *v.* Coffey, 5 Oregon 132 [1873]; Cross *v.* Tyrone M. & M. Co., 121 Pa. St. 394; Morse *v.* Rollins, 121 Pa. St. 537 [1888]; Lodge *v.* Barnett, 46 Pa. St. 480; Davis *v.* Baylor (Tex.), 19 S. W. Rep. 523; Sen *v.* Rehling (Tex.), 29 S. W. Rep. 1114; Church *v.* Stiles (Vt.), 10 Atl. Rep. 674 [1887]; Graves *v.* Mattison (Vt.), 38 Atl. Rep. 498; Teass *v.* City of St. Albans (W. Va.), 17 S. E. Rep. 400; Lampe *v.* Kennedy. 49 Wis. 601 [1880]; Borkenhagen *v.* Vranden (Wis.), 52 N. W. Rep. 260; Garrard *v.* Silver Pk. Mines, 82 Fed. Rep. 578. *And see* Lyman *v.* Gedney 114 Ill. 388; Tyler on Boundaries, Chaps. X to XIII. 3 Gray's Cases on Real Property, § 2, p. 285; 2 Amer. & Eng. Ency. Law 499. *And see Id.* (2d ed.), Boundaries.

[3] Yanish *v.* Tarbox (Minn.), 51 N. W. Rep. 1051.

[4] Cross *v.* Tyrone M. & M. Co., 121 Pa. St. 390.

[5] Jenkins *v.* Trager, 40 Fed. Rep. 726.

bers of the plat.[1] Dimensions or lengths of lines laid down upon a plat made by a surveyor must give way to proved or admitted facts conflicting therewith.[2] The monuments govern the field-notes;[3] but where the calls in a surveyor's field-notes can be ascertained, they control an ascertainable object not called for.[4]

574. It is the Policy of the Law to Maintain Existing Boundaries.—Judge Cooley of Michigan in one of his able opinions[5] has presented this subject in the following words, which is a lesson to surveyors and engineers: "The surveyor testifies with positiveness and apparently without hesitation that the fences and buildings on all the lots are not correctly located, and that therefore there is of course an opportunity for forty-eight suits at law, and probably many more than that. When an officer proposes thus dogmatically to unsettle the landmarks of a whole community, it becomes of the highest importance to know what has been the basis of his opinion. The record in this case fails to give any explanation, but the reasonable inference is that the surveyor has reached his conclusion by satisfying himself of the initial point of the survey, and then proceeding to survey out the plat anew with that as his starting-point. Of course by this method, if no mistake is made, there is no difficulty in ascertaining with positive certainty where, according to the plat, the original street and lot lines ought to have been located, and apparently the surveyor has assumed that that was all he had to do. Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey, without disclosing errors. This is as true of government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischief that would follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. No law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them.

"No rule in real-estate law is more inflexible than that monuments control courses and distances—a rule that is frequently applied in case of public

[1] Root *v.* Cincinnati (Iowa), 54 N. W. Rep. 206; Burke *v.* McCowen (Cal.), 47 Pac. Rep 367; City of Decatur *v.* Niedermeyer, 168 Ill. 68; Stetson *v.* Adams (Me.), 39 Atl. Rep. 575 [1898]; Smith *v.* Boone (Tex.), 19 S. W. Rep. 702; Parks *v.* Loomis, 6 Gray 467; Lunt *v.* Holland, 14 Mass. 149; Vance *v.* Fore, 24 Cal. 443; Buchanan *v.* Roy's Lessee, 2 Ohio St. 263; Magoun *v.* Lapham, 21 Pick. 135; McIver *v.* Walker, 9 Cranch 173; Yanish *v.* Tarbox (Minn.), 51 N. W. Rep. 1051 [1892].

[2] C. S. & C. R. R. Co. *v.* Tuttle, 7 Ohio Dec. 63.

[3] Robinson *v.* Laurer (Oreg.), 40 Pac. Rep. 1012; Layton *v.* N. Y. & T. Land Co. (Tex.), 29 S. W. Rep. 1120; Ogilvie *v.* Copeland (Ill.), 33 N. E. Rep. 1085; Utley *v.* Smith (Tex.), 32 S. W. Rep. 906; Hopper *v.* Justice (N. C.), 16 S. E. Rep. 626; Busk *v.* Manghum (Tex.), 37 S. W. Rep. 459. *But see* Cadeau *v.* Elliott (Wash.), 34 Pac. Rep. 916.

[4] Ratliff *v.* Burleson (Tex.), 26 S. W. Rep. 1003.

[5] Diehl *v.* Zanger, 39 Mich, 601 [1880].

surveys, where its propriety, justice, and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The surveyor should therefore have directed his attention to the ascertainment of the actual location of the original landmarks set, and if those were discovered, they must govern. If they are no longer to be discovered, the question is, 'Where were they located?' and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known."[1]

The rule is always applicable when it affects the intent of the grantor as shown in the conveyance.[2]

575. Relative Importance of Different Calls in a Description.—To carry out this policy the courts have recognized and given precedence and prominence to certain calls in a description to determine the boundaries of an estate. The calls as generally adopted to locate a survey are in the following order, viz.: (1) monuments or marks upon the ground; (2) calls for adjoiners; (3) courses and distances; (4) quantity or area. If the marks found upon the ground conflict with the calls for adjoiners, with the courses and distances, and with the area, the marks upon the ground, i.e., the monuments, must still govern.[3]

576. Monuments, if Identified, Control all Other Calls.—Where monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not.[4] It is not necessary even that the grantee shall have actual knowledge of the monuments.[5]

Where the evidence shows that courses and distances in a deed differ from the monuments on the ground, or the true line as agreed upon and indorsed by landmarks, the monuments govern.[6] The marks on the ground of an old survey, indicating the lines originally run, are the best evidence of the location of the survey, and if any evidence of such lines exist, it should be referred to the jury.[7]

A striking case of the preference for monuments over calls for adjoiners was shown in a Massachusetts case. Wild land was described as bounded "westerly on the county road, northerly and southerly by land owned by

[1] *See also* an address by Justice Cooley before the Michigan Association of Surveyors and Civil Engineers reported in Hodgman's Manual of Land Surveying, p. 314, and in Johnson's Theory and Practice of Surveying, p. 579.

[2] Fullam *v.* Foster, 68 Vt. 590.

[3] Jackson *v.* Lambert, 121 Pa. St. 187; Morse *v.* Rollins, 121 Pa. St. 537, *and cases cited supra*. This is equally true of government surveys. Watrous *v.* Morrison (Fla.), 14 So. Rep. 805; Diehl *v.* Zanger, 39 Mich. 601 [1880].

[4] Anderson *v.* Richardson (Cal.), 28 Pac. Rep. 679.

[5] Foley *v.* McCarthy (Mass.), 32 N. E. Rep. 669. *Accord*, Smith *v.* Boone (Tex.), 19 S. W. Rep. 702.

[6] Rook *v.* Greenwalt (Com. Pl.), 17 Pa. Co. Ct. Rep. 642; Bowen *v.* Gaylord (N. C.), 29 S. E. Rep. 340 [1898].

[7] Gratz *v.* Hoover, 16 Pa. St. 232 [1851].

'E.' and running easterly to Sheldon's corner, and containing twelve and one-half acres more or less." Sheldon's corner was at the easterly termination of the southerly line, and it was held that the northerly line must also be deemed to extend as far east as Sheldon's corner, although the lot would thereby be bounded on the north in part by land of another than "E.," which was not mentioned in the deed, and although the contents of the lot would thereby exceed 39 acres.[1]

Another case reported is where a line was described as running south to the "northwest corner of Burton; thence westerly along the northern line of Waterville," both parties assuming that the northeast corner of Waterville was at the northwest corner of Burton. It afterwards turned out that the Waterville corner and north line were a substantial distance further south. The grant was held to go to the Burton corner, and the southern boundary was run westerly therefrom, and parallel with the north line of Waterville, thus excluding the intervening territory.[2]

Where parties have stuck stakes to mark the corners of land conveyed, these stakes will govern, even though they are 627 feet apart, when the description has given the distance as 250 feet.[3]

577. Monuments Control in Government Surveys.—Where titles to lands have come directly from the government, and such lands have been surveyed by government surveyors or agents, their survey will be presumed to be correct and the burden of proving it wrong will be upon the one who impeaches its correctness.[4] If monuments have been established and erected, they must govern if their location can be ascertained.[5] The line actually run by the original government surveyors is the true line. Courses and distances, as contained in the field-notes and plats, are descriptions which serve only to assist in ascertaining where the line was actually run.[6]

If the lines established by the United States survey are obvious, they must be followed, though made on an assumed or wrong magnetic variation; and it is only when lost lines and corners are to be renewed that due allowance should be made for the variation of the magnetic needle from the true meridian.[7]

Where objects, natural or artificial, are called for in the field-notes of

[1] Clark *v.* Munyan, 22 Pick. 410 [1839]; Warden *v.* Harris (Tex.), 47 S. W. Rep. 834 [1898]. *But see* Pierce *v.* Brown, 24 Vt. 165 [1852]. *And see* Woodward *v.* Nims, 130 Mass. 70 [1881]; Thomasson *v.* Hanna (Ky.), 18 S. W. Rep. 227.

[2] Winnipisiogee Paper Co. *v.* New Hampshire Land Co. (C. C.), 59 Fed. Rep. 542; Land Co. *v.* Saunders, 103 U. S. 316, *distinguished.*

[3] Cooper *v.* Deal (Mo.), 22 S. W. Rep. 31; Warden *v.* Harris (Tex.), 47 S. W. Rep. 834 [1898].

[4] Miller *v.* White (Fla.), 2 So. Rep. 614 [1887]; Breen *v.* Donnelly (Cal.), 15 Pac. Rep. 845 [1888]; Greer *v.* Squire (Wash.), 37 Pac. Rep. 545.

[5] Vroman *v.* Dewey, 23 Wis. 530 [1868]; Foley *v.* McCarthy (Mass.), 32 N. E. Rep. 669; Knight *v.* Elliott, 57 Mo. 317 [1874].

[6] Beltz *v.* Mathiowitz (Minn.), 75 N.W. Rep. 699; Busk *v.* Manghum (Tex.), 37 S. W. Rep. 459.

[7] Taylor *v.* Fomby (Ala.), 22 So. Rep. 910 [1897].

official surveyors, the presumption is that such objects actually existed [1] and were established at the places indicated by the field-notes. The burden of proving otherwise is on him who disputes their correctness.[2]

Courses, distances, and area as given by the field-notes of a government survey will control in ascertaining the corners of a survey where the monuments established by the government surveyors cannot be found.[3] The course must yield whenever the monuments are certain or are capable of being made certain. If the monuments cannot be found or their locations established, then resort must be had to the courses and distances.[4]

All disputes as to the boundaries of land are to be governed by the United States surveys unless there is some statute to the contrary.[5] A corner called for in the field-notes of an original survey marked on the ground by the surveyor at the time of the survey, so that it can be identified, controls a claim for another object, as another corner, when it is shown that the surveyor did not go on the ground and establish such other corner, but merely supposed that course and distance from the other corner would reach it.[6]

The section corner located by the government surveyors will control though it be in a place different from that given in the field-notes and plat.[7] It is none the less a government corner because it is not in the township line, and must be observed and regarded in the location of other corners lost or destroyed.[8]

578. When Monuments are Lost or Destroyed.—The monuments themselves need not exist, for where they are gone they may be supplied by proofs of their former existence.[9] Their former site or location must be established with reasonable certainty, in order that they shall prevail over the lines established by explicitly given courses and distances, or to govern an evident error of description by courses and distances.[10]

Where field-notes call for unmarked lines of surrounding older surveys, the position of which can be actually ascertained, and there is no evidence as to how the survey was actually made, it will be presumed that the surveyor

[1] Kuechler *v.* Wilson (Tex. Sup.), 18 S. W. Rep. 317.

[2] Greer *v.* Squire (Wash.), 37 Pac. Rep. 545.

[3] Carter *v.* Hornback (Mo.), 40 S. W. Rep. 893; Beardsley *v.* Crane (Minn.), 54 N. W. Rep 740; Deaver *v.* Jones (N. C.), 26 S. E. Rep. 156; Blair *v.* Brown (Wash.), 50 Pac. Rep. 483 [1897]. *See* Holler *v.* Emerson (Cal.), 44 Pac. Rep. 1073.

[4] Whitcomb *v.* Dutton (Me.), 36 Atl. Rep 67; Major *v.* Watson, 73 Mo. 661 [1881].

[5] Taylor *v.* Fomby (Ala.), 22 So. Rep. 910 [1897].

[6] Cox *v.* Finks (Tex.), 41 S.W. Rep. 95.

[7] Peterson *v.* Skjelver (Neb.), 62 N. W. Rep. 43, Lampe *v.* Kennedy, 49 Wis. 601; Stoll *v.* Beecher (Cal.), 29 Pac. Rep. 327.

[8] McClintock *v.* Rogers. 11 Ill. 279; Major *v.* Watson, 73 Mo. 661 [1881].

[9] Major *v.* Watson, 73 Mo. 661 [1881]; Morse *v.* Rollins, 121 Pa. St. 537; Beltz *v.* Mathiowitz (Minn.), 75 N. W. Rep. 699. Parol proof is admissible. Broaddus *v.* Eubanks (Ky.), 38 S. W. Rep. 134; Greely *v.* Weaver (Me.), 13 Atl. Rep. 575 [1888].

[10] Yanish *v.* Tarbox (Minn.), 51 N. W. Rep. 1051; Stoughton *v.* Rice (Ky.), 32 S. W. Rep. 1083. *See* Black *v.* Walker (N. D.), 75 N. W. Rep. 787.

actually made the survey on the ground, and such unmarked lines will prevail over calls for courses and distances in case of conflict.[1]

A grant is always to be interpreted with reference to monuments and circumstances existing at the time of the conveyance, and cannot be extended so as to include other lands by an implication or by a conjecture that possibly, had the parties foreseen changes in matters affecting the grant, they might have made it in other and different terms.[2]

579. In Government Surveys it is the Original Monuments that Control.—In the rule that monuments control courses and distances, and that when monuments and measurements vary the monuments always control, the reference is to monuments and measurements made by the original survey.[3]

The object of a survey should be to locate the original monuments; and a later survey made by an official surveyor, and monuments erected in accordance with it, are not alone sufficient to overcome the evidence afforded by monuments already existing. It must be shown that the new monuments were in fact correct and that the earlier ones were not correct.[4]

Where there are two conflicting monuments, one of which corresponds with the courses and distances, that one should be taken, and the other rejected as surplusage.[5] If the boundary be not known and fixed, the courses and distances will determine it.[6]

In the absence of calls for artificial or natural objects, the lines of a survey are controlled by courses and distances;[7] and where a surveyor makes a mistake in supposing that he has reached the western lines of an older survey when running the course and distance called for, the calls for course and distance should control in locating boundaries.[8]

The true corner of a governmental subdivision of land is where the United States surveyors in fact established it.[9] The resurvey must follow the boundaries and monuments as run by the original survey, if the monuments can be found, or the places where they were originally placed identified.[10] If

[1] Waggoner *v.* Daniels (Tex.), 44 S. W. Rep. 946 [1898].

[2] White's Bank *v.* Nichols, 64 N. Y. 65; Falls Village W.-p. Co. *v.* Tibbetts, 31 Conn. 165; Banks *v.* Ogden, 2 Wall. 57; Tibbetts *v.* Estes, 52 Me. 566; Weisbrod *v.* C. & N. W. R. Co., 18 Wis. 35; Kirkham *v.* Sharp, 1 Whart. 323; Cook *v.* McClure, 58 N. Y. 437; Minor *v.* Kirkland (Tex.), 20 S. W. Rep. 932. *And see* Holland *v.* Thompson (Tex.), 35 S. W. Rep. 19.

[3] Woodbury *v.* Venia (Mich.), 72 N.W. Rep. 189 [1897]; Morrison *v.* Seamans, 183 Pa. St. 74.

[4] Stowers *v.* Gilbert (Sup.), 33 N. Y. Supp. 101; Knippa *v.* Umlang (Tex.), 27 S. W. Rep. 915.

[5] Zeibold *v.* Foster (Mo. Sup.), 24 S. W. Rep. 155.

[6] Hanson *v.* Red Rock Tp. (S. D.), 57 N. W. Rep. 11; Aransas Pass Col. Co. *v.* Flippen (Tex.), 29 S. W. Rep. 813.

[7] Ratliff *v.* Burleson (Tex.), 25 S. W. Rep. 983.

[8] Aransas Pass Colonization Co. *v.* Flippen (Tex. Civ. App.), 29 S. W. Rep. 813.

[9] Beardsley *v.* Crane (Minn.), 54 N. W. Rep. 740. *Semble*, Blair *v.* Brown (Wash.), 50 Pac. Rep. 483; Deaver *v.* Jones (N. C.), 26 S. E. Rep. 156; Briton *v.* Ferry, 14 Mich. 53; Johnson *v.* Simerly (Ga.), 16 S. E. Rep. 961.

[10] Randall *v.* Burk Tp. (S. D.), 70 N.W. Rep 837; Peterson *v.* Skjelver (Neb.), 62 N. W. Rep. 43; Diehl *v.* Zanger, 39 Mich. 601; Meydenbauer *v.* Stevens (D. C.), 78 Fed. Rep. 787; Dowdle *v.* Cornue (S. D.), 68 N.W. Rep. 194.

there is a conflict between the quantity expressed in the patent and that shown by the survey, the latter will control.[1]

Where the stakes found conflict with the field-notes, the burden of showing that the stakes were monuments of the original survey is on the party claiming to the stakes.[2]

580. Identification of Monuments—Evidence Admissible.*—In the proof of bounds and monuments almost any evidence is admissible to identify those named in a description. Trees and stumps are frequently referred to as monuments in a new country and in farm surveying, and it is frequently necessary or desirable to prove the age of certain trees, or the number of years which have elapsed since certain marks or blazings were made. To this end, efforts have been made on several occasions to introduce blocks cut from trees showing the rings of growth, one of which is supposed to be added each year in deciduous trees. Such blocks were admitted and the rings of growth counted to prove the date at which an early survey had been made.[3]

In another case where there was no proof offered that the number of annual concentric layers or rings in the trunk of a tree did correspond with the years of its age, the court held that the hypothesis about the formation of each one of such concentric layers could not be judicially received as evidence to show the period which had elapsed. The point to be determined was whether in the growth of trees a concentric layer of wood under the bark was a ring of invariable formation or not. The opinion of the court contains a most interesting discussion upon the subject of forestry and the growth of vegetation.[4]

Where the best evidence of the location of a displaced monument in the boundary between two surveys is not introduced, but other evidence thereof is admitted without objection, a finding in accordance therewith is not without support.[5]

On an issue as to the location of the lines of several surveys, field-notes of one of the earlier ones are admissible where they would aid in the location of the lines of any of the others, and show that one of the lines therein, being a marked boundary, would be recognized by the same surveyor when subsequently making another of the surveys.[6]

Old mounds with pits and stakes, having the appearance of government mounds, found at points distant from the points indicated by the government field-notes by courses and distances, afford but slight evidence that they are the original government mounds, unless they have existed for a long time,

[1] Stonewall Phosphate Co. *v.* Peyton (Fla.), 23 So. Rep. 440 [1897].
[2] Robinson *v.* Laurer (Oreg.), 40 Pac. Rep. 1012.
[3] Cross *v.* Tyrone M. & M. Co., 121 Pa. St. 394.
[4] Patterson *v.* M'Causland, 3 Bland's Ch. Repts. 69 [1841].
[5] Peters *v.* Gracia (Cal.), 42 Pac. Rep. 455.
[6] Daniels *v.* Fitzhugh (Tex.), 35 S. W. Rep. 38.

* *See* Secs. 617–640, *infra.*

and have been generally recognized as the undisputed government corners.[1]

A river will not control metes and bounds when it is not clear that such was the intention, when another natural monument could more properly be adopted as a boundary, and when the identity of the land can be sufficiently established from the distances given in connection with the acreage.[2]

If the evidence shows that a half section corner was located at a certain point, the court should establish the corner at that point even though such point is not equidistant from the section corners on either side of it.[3]

Oral evidence is admissible to establish the boundaries of land conveyed.[4] Where there is a conflict in the calls of a railroad survey, parol testimony is admissible to show where the metes and bounds of the surveys were actually run and marked upon the ground.[5]

Where the evidence is conflicting as to the identity of a corner forming a boundary, the question is for the jury.[6]

Where there is no evidence as to how a survey was made, the presumption of law is that it was actually made on the ground as the law requires, and this presumption cannot be silenced by the mere opinion of a surveyor who testifies that it was not so made.[7]

581. Fences as Monuments.—Fences not referred to in a deed cannot control the distances stated in the deed.[8] The position of old fences may be considered in ascertaining disputed boundaries.[9] As between the old boundary fences and any survey made for the monuments after dispute, the fences are by far the better evidence of what the lines of the lot actually were.[10] A fixed, visible monument can never be rejected as false or mistaken in favor of mere courses and distances, as a starting-point, when there is nothing else in the terms of the grant to control and override the fixed and visible call.[11]

582. Natural Monuments, as Roads, Streams, and Ways.*—Fixed monuments control courses and distances in a description of land in a deed. Where a river or highway or railroad is made a boundary-line, it is a fixed monument the same as the starting-point in a survey, and the distances between such monuments have little weight in the interpretation or determination of the survey.[12]

[1] Hanson *v.* Red Rock (S. D.), 57 N. W. Rep. 11.

[2] Hostetter *v.* Los Angeles Terminal Ry. Co. (Cal.), 41 Pac. Rep. 330.

[3] Doolittle *v.* Bailey (Iowa), 52 N. W. Rep. 337; Walrod *v.* Flanigan (Ia.), 39 N. W. Rep. 645 [1888]. *But see* Williams *v.* Winslow (Tex.), 19 S. W. Rep. 513.

[4] Broaddus *v.* Eubanks (Ky.), 38 S. W. Rep. 134.

[5] Minor *v.* Kirkland (Tex.), 20 S. W. Rep. 932.

[6] Deaver *v.* Jones (N. C.), 26 S. E. Rep. 156; Taylor *v.* Fomby (Ala.), 22 So. Rep. 910 [1897].

[7] Aransas Pass Col. Co. *v.* Flippen (Tex.), 29 S. W. Rep. 813.

[8] Kashman *v.* Parsons (Conn.), 39 Atl. Rep. 179 [1898].

[9] Hoffman *v.* City of Port Huron (Mich.), 60 N. W. Rep. 831.

[10] Stewart *v.* Carlton, 31 Mich. 270.

[11] Gerrard *v.* Silver Peak Mines (U. S. C. C.), 82 Fed. Rep. 578 [1897].

[12] Piper *v.* Connolly, 108 Ill. 646 [1884]; Church *v.* Stiles (Vt.), 10 Atl. Rep. 674 [1887].

See Secs. 401–460, *supra*.

A call for a river as a boundary-line overcomes distance and quantity in the absence of any ambiguity in the description.[1]

Where a call was a corner of a lot in an incorporated town, and the other call was the low-water line of a navigable stream, it was held that both monuments must be considered to determine the location of the land even if they did not correspond with the courses, distances, or quantity given in the description. The courses and distances were made to conform to the natural and artificial monuments named as boundaries.[2]

Where the description of land is by metes and bounds, and it is complete in itself, and it excludes a certain road and reference to said road for the purpose of designating the point from which the description starts and the course of a line therefrom, it has been held not to show an intention to make the road a boundary of the land except as it coincides with the description.[3]

583. Calls for Adjoiners against Courses and Distances.—The second factor of importance in the calls of a description is that of adjoining estates. It is submitted that this may be a mere reference to other elements contained in the description of the adjoining estate. A reference in a description to an adjoining tract which is itself located by courses and distances would be a reference to courses and distances, and it will be difficult to understand how a reference to courses and distances in the deed of an adjoining estate can govern the same elements of the deed of land to be located.

If the adjoining premises are definitely located by monuments or by boundaries that have been long acquiesced in and agreed upon, and have been generally known, then no doubt this will be a governing element. It is presumed that a reference in a description to an adjoining estate the description of which was clear and certain might control a confused and uncertain description;[4] but it cannot be believed that an estate bounded by an adjoining estate would be controlled thereby unless the adjoining estate was more definitely and certainly located than the one described by it.[5]

Calls in a deed fixing the boundaries of the land conveyed by lands of adjacent owners will control, when these boundaries are well defined, though there is a deficiency in the number of acres.[6]

Under the rule that that is certain which can be made certain, a description bounding a grant by the northern line of a prior grant is sufficiently definite if referred to under circumstances making it a controlling call, although said northern line has never been marked upon the ground.[7] It is, for all the practical purposes of defining the lands embraced in it, the same as to say "go to, and run with, the lines of such grant."[8]

[1] Lampman *v.* Van Alstyne (Wis.), 69 N. W. Rep. 171.
[2] Sayers *v.* Lyons, 110 Iowa 249 [1859].
[3] Lankin *v.* Terwilliger (Oreg.), 29 Pac. Rep. 268.
[4] Chesley *v.* Holmes, 40 Me. 536.
[5] Fullam *v.* Foster (Vt.), 35 Atl. Rep. 484; Holland *v.* Thompson (Tex.), 35 S. W. Rep. 19.
[6] Gugliemi *v.* Geismar (La.), 14 So. Rep. 501.
[7] Winnipisiogee Paper Co. *v.* New Hampshire Land Co. (C. C.), 59 Fed. Rep. 542.
[8] O'Dell *v.* Swaggerty (Tenn.), 42 S. W Rep. 175 [1897].

However, where a call for a line read, "south 360 chains to a stake supposed to be in D.'s line, thence with his line 390 chains to his N. E. corner," and 360 chains south did not reach D.'s line, the call for the stake being indefinite and uncertain, the call for course and distance was held to control, especially where D.'s line was not established by fixed monuments.[1]

The rule is well established that where land is described by courses and distances, and also by calls for adjoiners, the latter will govern if there be a discrepancy and there are no monuments.[2]

The adjoining land so referred to becomes a monument which will control distances; and a grantee who accepts such a deed bounding him by another's land can hold no portion of the other's land even though the latter's deed was from the same grantor and was not legally, though actually, recorded.[3] If the adjoiner's land is described by metes and bounds, the grantee is limited to the tract described in his deed by metes and bounds, though the area be less than it was the intention of the parties to convey.[4]

The official survey and plat of any town site located on government lands, and the lots and blocks thereof, are permanent landmarks, which may be considered in establishing the location of adjoining lands outside the town-site.[5]

584. Calls for Adjoiners against Points of Compass.—Where a description was confused as to the points of the compass, and land was described as bounded on the east by a road, when the road was on the south, on the south by land of M., instead of on the west, it was held to be a question of fact, to be ascertained by the language used and the adjoiners called for, and that for the purposes of that construction the points of the compass specified should yield to the adjoiners actually intended and called for.[6]

Where a southern boundary is described as beginning at a certain corner, and running "thence east to the southwest corner of the land of C.," such corner becomes a monument of description; and if its location is definitely ascertained, the boundary will be indicated by a straight line running from the point named to the southwest corner of C.'s land, though the line would run in a southeasterly direction, and the quantity of land conveyed would be about 35 acres, instead of 30 acres, more or less, as given in the conveyance.[7] But where a call for another survey, if followed, will necessitate a total disregard of course and distance, and cause the remaining bounds both to conflict with several other surveys and to end so far from the starting-point as

[1] Brown *v.* House (N. C.), 24 S. E. Rep. 786, Avery and Clark, JJ., *dissenting*.

[2] Koch *v.* Dunkel, 90 Pa. St. 264 [1879]; Langerman *v.* Nichols (Tex.), 32 S. W. Rep. 124; Smith *v.* Headrick, 93 N. C. 210 [1885]; Connor *v.* Johnson (S. C.), 30 S E. Rep. 833 [1898]; Fullam *v.* Foster (Vt.), 35 Atl. Rep. 484; Smith *v.* Catlin Ld. & Imp. Co. (Mo.), 22 S W. Rep. 1083.

[3] Bryant *v.* Maine Cent. R. Co. (Me.), 9 Atl. Rep. 354 [1887].

[4] Probett *v.* Jenkinson (Mich.), 63 N. W. Rep. 648; Gugliemi *v.* Geismar (La.), 14 So. Rep. 501.

[5] Carroll *v.* Price (D. C.), 81 Fed. Rep. 137.

[6] Stroupe *v.* McCloskey (Pa.), 10 Atl. Rep. 42, 481 [1887].

[7] Abbey *v.* McPherson (Kan. App.), 41 Pac. Rep. 978.

to exclude about 1000 acres from the survey,[1] it is properly ignored. Where the boundaries of a survey cannot be located by its own calls and field-notes, they may be established by the field-notes of adjacent surveys.[2]

In a case where the surveyor's field-notes showed actual surveys on the ground, and the lines and corners thereof were called for as contiguous, and evidence of such surveys was found which reasonably indicated an excess in the distance of the lines of 260 varas in 7116 varas, at the date of the survey (1856) considered trifling, and a slight variance of 75 varas in the course, these discrepancies were held insufficient to overcome the other evidence pointing to the fact that the surveys were contiguous.[3]

Where the description in a deed, after following the line of another tract to a certain point, contains a clause, "thence with that line to a stake on the west bank of the branch," it should be construed as intending to follow the boundaries of such tract, though the courses change before reaching the branch, and though the branch would be reached at a less distance by following an extension of the first course from the point in question.[4]

585. Adjoining and Cornering Estates.—As to whether a tract of land must lie alongside of another to be "adjoining" has been determined by the courts, which have held that if two tracts of land touch each other at a corner but do not lie alongside, they are *adjoining*. It was so held when it was agreed that a railroad company would erect a depot upon a certain tract of land that was adjoining another tract of land.[5]

A call for land contiguous to another tract has been held to require actual contact or a touching of the estates, in the absence of anything in the deed to show that the word was used in any other sense.[6]

586. Calls for Courses against Distances.—The third factor in order of importance is the course, which is usually held to govern the distance. Such a rule of construction has been maintained for generations, but for what reason is not apparent to surveyors of to-day. With modern instruments and the skill with which the more enlightened surveyor of to-day handles them, there can be no just reason for a preference of the call for courses over a call for distances. If one is preferred to the other, it must be due to attendant circumstances. The courts in many cases have acknowledged this and modified their rules accordingly. The better law of to-day is that there is no fast and firm rule that obliges a court or surveyor to prefer the one or the other. If any preference is given, it must depend upon the circumstances of each particular case.[7] There is no arbitrary rule that the courses or the dis-

[1] Cregg *v.* Hill (Tex.), 17 S. W. Rep. 838.
[2] Kuechler *v.* Wilson (Tex. Sup.), 18 S. W. Rep. 317.
[3] Graham *v.* Dewees (Tex. Sup.), 20 S. W. Rep. 127.
[4] Buckner *v.* Anderson (N. C.), 16 S. E. Rep. 424.
[5] Fitzgerald *v.* Britt, 43 Ia. 498.
[6] Holston S. & P. Co. *v.* Campbell (Va.), 16 S. E. Rep. 274.
[7] Justice Story in Preston *v.* Bowman, 6 Wheat. 580 [1821]; Ratliff *v.* Burleson (Tex.). 26 S. W. Rep. 1003. *And see* Loring *v.* Newton, 8 Greenl. 61, 68 [1831]

tances shall govern. It must depend upon the circumstances of each particular case. If marked lines and corners are established, they will govern, and other descriptions must yield to them.[1]

If the description contains no patent ambiguity, but, on its application to the land described, it results in a lot of the most singular shape, plainly never intended by the parties, there is no error in ignoring the calls for courses and applying only the calls for distance.[2]

587. Courses Held to Govern Distances.[3]—It is well to remember, however, that there has been a rule that courses shall govern distances, and that courts are likely to adhere to such precedents. Whether due to their conservatism or to their ignorance of modern methods of surveying, they are likely to favor courses and give them the greater weight when in conflict with distances. In a comparatively recent case (1887) it was held that a line described as running at right angles to a street was not varied because the next call of 30 feet was in fact 33½ feet. The angle was held to control.[4]

A Massachusetts case prominently brings out the features of this ancient rule.[5] A lot occupying an acute-angled corner was described as "beginning at the corner, thence northerly by W. St. 134 feet, to land of G., thence running westerly by land of G. 60 feet, thence running southerly by land of said G. *at right angles*, to Dix St., thence 61 feet more or less to the first-mentioned bound (corner) containing 7770 feet more or less." Here was a conflict between a distance and area on one hand and a course (right angle) on the other hand. The actual distance from the corner when the line was drawn at right angles was 80½ feet, against 61 feet called for in the description; and the area 9100 square feet, against 7770 square feet mentioned in the conveyance. If the line were run southerly parallel to W. street, the distance actually measured would be 60½ feet and the area exactly 7770 square feet as required, and the angle would be 81 degrees instead of a right angle (90 degrees).[6]

Such a check could not fail to satisfy a most exacting and cautious surveyor, but the court held that as a matter of law the line should be run *at right angles* notwithstanding the checks afforded by the distance and area. The court refused to admit evidence of the fact that the adjoining lots had been conveyed by the same common grantors according to a plan, which plan showed the lines parallel to W. street and the distance to be 60½ feet on Dix

[1] Goodman *v.* Myrick, 5 Oregon 65; Palms *v.* Shawano Co., 61 Wis. 211 [1884]; Meade *v.* Leon, etc., Co. (Tex.), 22 S.W. Rep. 298.

[2] Tolkin *v.* Anderson (Tex.), 19 S. W. Rep. 350.

[3] Courses were held to govern distances in the following cases: Hall *v.* Eaton, 139 Mass. 217: Platt *v.* Bente (N. J.), 10 Atl. Rep. 283 [1887]; Smith *v.* Improvement Co. (Mo. Sup.), 22 S.W. Rep. 1084; Harding *v.* Wright (Mo. Sup.), 24 S. W. Rep. 211; Duncan *v.* Hall (N. C.), 23 S. E. Rep. 362; Rand *v.* Cartwright (Tex.), 18 S. W. Rep. 794.

[4] Platt *v.* Bente (N. J.), 10 Atl. Rep. 283 [1887].

[5] Hall *v.* Eaton, 139 Mass. 217.

[6] Hall *v.* Eaton, 139 Mass. 217 [1885]; Platt *v.* Bente (N. J.), 10 Atl. Rep. 283 [1887]; Iverson *v* Swan (Mass.), 48 N. E. Rep. 282.

street, that the line did not make a right angle with Dix street, and that the grantors of the grantees saw the plan before they took the deed; and it also refused evidence that a fence had been erected upon the line parallel to W. street with the parties' consent, and had remained there several years. The matter of law maintained by the court seems to have been that the description was complete, clear, and certain in itself, and that therefore no extrinsic evidence could be admitted; that as the plan was not mentioned in the deed it could not be referred to; and that to the court it appeared that the intention of the parties was that the third line be perpendicular to Dix street, and not parallel to W. street.

It may be said that generally areas are a direct function of the distances, and therefore when compared with courses they should not be given much weight in deciding which should control; but in such a case as the one just considered it seems that the area affords, to say the least, sufficient evidence to show that the angle could not be a right angle, and to create an uncertainty sufficient to allow evidence outside of the deed. This case is cited to prove that courses may be taken as governing distances. It was not decided on that ground, but rather upon the ground mentioned, that it best carried out the evident intention of the parties.[1]

A similar but plainer case came up in the New York courts for construction. Land situated in a city block near an obtuse-angled corner was described as "Beginning at . . . running thence northeasterly, along Grove Street, 25 feet; and thence northwesterly and parallel with Woodruff Avenue, 108 feet 9 inches, to lot No. 80 on said map; thence southwesterly, along lot No. 80, 25 feet; and thence southeasterly parallel with Woodruff Avenue, 108 feet 9 inches, to the westerly side of Grove Street, the point or place of beginning." Lines drawn from Grove Street, 108 feet 9 inches, parallel to Woodruff Avenue, would not reach lot No. 80 by 5 inches, and it was held that there was a mistake in describing the length of the lines parallel to Woodruff Avenue, and that it was intended that they should extend 109 feet 2 inches, and not that they should run in such a direction that they would reach lot 80 at a distance of 108 feet 9 inches from Grove Street. It being clearly stated in the deed that the lines of the lot were parallel to Woodruff Avenue, the court held that the fact that the corresponding lines in the conveyances of neighboring property were at right angles to Grove Street, instead of being parallel to Woodruff Avenue, was immaterial.[2] The effect of such a decision upon the adjoining property owners will be appreciated by surveyors, if other lots had been laid out perpendicular to Grove Street.

A specific grant of land by courses and monuments cannot be enlarged so as to change a line described as running "south" to "southeast," by the

[1] Hall *v.* Eaton, 139 Mass. 217.

[2] Casey *v.* Dunn, 8 N. Y. Supp. 305 [1890]; Airey *v.* Kimble, 42 Atl. Rep. 533. *See* Phillips *v.* Ritter (N. Y.), 20 App. Div. 34. *But see* Airey *v.* Kunkle (C. P.), 6 Pa. Dist. Rep. 1, 18 Pa. Co. Ct. 620.

words "meaning to convey the north half of" the farm of which the land conveyed was a part.[1]

588. Calls for Courses and Distances against Area or Acreage.—Courses and distances will always control quantity where the intention is not definitely ascertained. As quantity or area is directly dependent on courses and distances, being calculated from them, it should be controlled by them. If the distances and angles of a survey are wrong, the area is likely to be erroneous, and therefore area is held the last and the least important element of a description. This is the universal law. Metes and bounds and other descriptive calls in a deed will control the call for quantity unless it clearly appears to have been the intent of the grantor to give only a definite quantity.[2]

The metes and bounds govern the quantity unless it appears beyond controversy that the quantity was one of the principal conditions of the contract.[3]

The mention of the acreage or area of a field after a description is not a warranty of quantity, unless the warranty is expressed. Thus the following clause inserted after a description by metes and bounds, "and containing by survey 250 acres," is descriptive merely and not a warranty of quantity; and although the same deed describes and conveys another tract in less definite and more cautious language, e.g., "the exact number of acres being unknown, but containing by estimate 120 acres, be the same more or less," this difference of phraseology does not show that a warranty was intended as to the quantity in the tract.[4]

A deed conveying land by metes and bounds, and further describing it as containing a certain number of acres, more or less, which was more than was actually included in the description, and as being the premises now in the possession of the grantor and formerly conveyed to him by a third person, will not be held to include a tract of wild land situated some distance from the other, though the amount of land in such tract would make up the amount described in the deed, and though it was purchased from such third party.[5] *

589. Quantity of Land a Factor in a Description.—Little importance is attached to the acreage named in a description, as "34.69 of an acre, half of the south side of the southeast side of section 14," when this is immediately

[1] Reed *v.* Knights, 87 Me. 181.

[2] Evans' Adm'r *v.* Temple, 35 Mo. 494; Colter *v.* Mann, 18 Minn. 96; Rioux *v.* Cormier (Wis.), 44 N. W. Rep. 654; Hodges *v.* Denney (Ala.), 5 So. Rep. 492; Doe *v.* Vallejo, 29 Cal. 386; Quillen *v.* Betts (Del.), 39 Atl. Rep. 595 [1897]; Ratliff *v.* Burleson (Tex.), 26 S. W. Rep. 1003; Raymond *v.* Coffey, 5 Oreg. 132 [1873]; Hess *v.* Cheney (Ala.), 3 So. Rep. 791 [1888]; Thompson *v.* Sheppard (Ala.), 5 So. Rep. [1889].

[3] Bd. of Commrs. *v.* Younger, 29 Cal. 173 [1865]; Farbell *v.* Bowman, 103 Mass. 341 [1869]; Hodges *v.* Denny (Ala.), 5 So. Rep. 492 [1889].

[4] Thayer *v.* Finton, 108 N. Y. 394 [1888]; Paine *v.* Upton, 87 N. Y. 327 [1882]; Lobit *v.* McClave (Tex.), 28 S. W. Rep. 726; Silver Creek Cem. Co. *v.* Union Lime & Cem. Co. (Ind.), 35 N. E. Rep. 125; Lipscomb *v.* Underwood (Tex.), 27 S. W. Rep. 155.

[5] Thayer *v.* Finton, 108 N. Y. 394 [1888]. *But see* Pierce *v.* Brown, 24 Vt. 165 [1852].

* *See* Secs. 596, 597, *infra, More or Less.*

followed by a description giving the corners and boundaries of the land.[1] A phrase in a deed following the description, "containing 111.7 acres," is a representation only and not a warranty of quantity. Oral evidence is *inadmissible* to show that there was such a warranty of quantity.[2]

When there is ambiguity in a description the quantity of land specified should be considered by the jury in connection with the boundaries named and other data, to determine what the true boundary is.[3]

The rule that monuments or objects mentioned in the deed control metes and bounds is not an inflexible one. It applies only when the intention of the parties has been left in doubt by the language of the conveyance.[4] The distances and quantity are entitled to some weight in getting at the intention of the parties, especially where they more nearly harmonize with one theory than with the other. Where a description applied to two tracts of land one of which went down the meanders of a stream about three-quarters of a mile, and the other a mile and a quarter, the one making about twenty-five acres and the other three hundred and forty acres, and where the description called for twelve acres more or less, it was held that the court could come to but one rational conclusion, and that was that the nearer monument was properly taken.[5]

A patent is not invalid because embracing 10,000 acres while calling for only 8000.[6] A mistake in a mortgage by which "2000 acres more or less" is written "200 acres more or less," but where the boundaries are correctly described, is sufficient notwithstanding the mistake in quantity; it is sufficient to give notice to the subsequent mortgagor.[7] Any excess in the quantity of land in the survey will not be considered unless it will assist in determining the original location of the disputed line.[8]

A grantor may be bound by the express terms of his contract of sale in respect to quantity.[9]

590. Effect of Representations as to Quantity.—With every contract of sale there is annexed a warranty that the thing bought or sold shall correspond with the representation made at the time of concluding the contract of sale between the parties. Especially is this true with regard to quantity, though it is largely overlooked with regard to quality. Such a *warranty* is neither waived nor destroyed by the use of the words "more or less" when the number of acres has been specified, and if the error, afterwards discovered, is

[1] Stevens *v.* Wait, 112 Ill. 544.
[2] Hobein *v.* Frick, 69 Mo. App. 262 [1897].
[3] Cavazos *v.* Trevino, 6 Wall. 773 [1867]; Campbell *v.* Carruth (Fla.), 13 So. Rep. 432; Hoffman *v.* Port Huron (Mich.), 68 N. W. Rep. 831.
[4] People *v.* Jones, 112 N. Y. 597 [1889].
[5] Doe *v.* Vallejo, 29 Cal. 386; Cochran *v.* Smith (Sup.), 26 N. Y. Supp. 103.
[6] Ballowe *v.* Hillman (Ky.), 37 S. W. Rep. 950.
[7] Kennedy *v.* Boykin (S. C.), 14 S. E. Rep. 809.
[8] Branch *v.* Simons (Tex.), 48 S. W. Rep. 40.
[9] Heyer *v.* Lee, 40 Mich. 353 [1879].

greater than what might reasonably be expected from the variation of instruments and similar causes.[1]

Where one who buys a piece of land at a price per square foot, paying for a certain number of feet, represented by a plan having metes and bounds and dimensions, and the number of square feet of the lot is considerably less than what he has paid for, he may recover back the amount paid for it in excess of the actual area. This was so held where the mistake was not discovered until six months after the sale, the purchaser not having been guilty of laches.[2] If the buyer had the means of ascertaining the quantity of the land bought and did not do so, it seems that equity will afford him no relief on the ground that the seller misrepresented the quantity.[3]

Where an owner of property innocently but incorrectly states the quantity of land contained in his farm, and a purchaser, in reliance upon his statement, enters into a contract and takes a deed, the purchase-price being estimated at a price per acre, and where it is subsequently discovered that the quantity stated is materially less, he is entitled to the assistance of the courts to correct the mistake. The purchaser is not deprived of his remedy by the addition of the words "more or less" to the statement of the quantity contained in the deed. The words "more or less" were held not to import a special agreement that the purchaser takes the risk of the quantity, nor are they equivalent to a stipulation that, if a mistake be discovered, there shall be no relief.[4]

If there was neither fraud, nor mutual mistakes, nor representations as to the number of acres, and there was no particular purpose mentioned which required that the contract should contain a certain number of acres, then no allowance can be made for any deficiency in the acreage.[5] If the intention of the parties was to make a sale of a quantity of land specified, and the price paid was computed at a fixed rate on the quantity named, and the deed was made and accepted and the business transacted under a mutual mistake of fact, and there is nothing in the terms of the deed which manifests an intention to waive or change the original terms of the sale, the purchaser may recover for a deficiency in quantity.[6]

Some courts hold that considerable variance should be allowed even where it results from mistake only, in the absence of fraud or deception.[7] If the contract be not executed and there be actual misrepresentation as to the quantity of the land, even though not fraudulent, and the mistake be so essential that the contract would not otherwise have been entered into had the parties known, then equity will grant relief. The same doctrine has been applied to executed contracts.[8] In patents for land granted by the state

[1] Pendleton *v.* Stuart (Va.), 5 Call 1; Caldwell *v.* Craig (Va.), 21 Gratt. 137; Jollife *v.* Hite (Va.), 1 Call 301.

[2] Farbell *v.* Bowman, 103 Mass. 341 [1869].

[3] Bd. of Commrs. *v.* Younger, 29 Cal. 173 [1857].

[4] Paine *v.* Upton, 87 N. Y. 327 [1882].

[5] 15 Amer. & Eng. Ency. Law 721.

[6] Paine *v.* Upton, 87 N. Y. 327; Tarbell *v.* Bowman, 103 Mass. 341; Miller *v.* Craig, 83 Ky. 623.

[7] Hill *v.* Buckley, 17 Ves. 401.

[8] 15 Amer. & Eng. Ency. Law 721.

there is an undertaking on the part of the state that the land described shall contain the number of acres specified, and the excess or deficiency permitted by the use of the words "more or less" is restricted to the reasonable amount due to small errors in surveying and to variations in instruments. The remedy for a deficiency in such a case has been held to lie, not in making good the pecuniary loss, but in the addition to the contract patent of adjoining vacant land under a warrant of a resurvey.[1]

If it be clear that the intention was to convey only the quantity mentioned, then the conveyance must include that quantity and need contain no more. Parol evidence may be allowed to show that the sale was in fact by the acre, if there be any uncertainty in the description by metes and bounds.[2]

If, however, the intention to convey a particular tract or a particular quantity is clear although the parties have given an incorrect specific description of it, the tract or quantity will pass.[3] A call for a lot by the name or number which it bears on a plat of the land was held to prevail over courses and distances, and ordinarily over calls for monuments,[4] it being evident that it was the intention to convey the lot by the plat. A party purchasing lots on the margin of a town-site purchases only the land contained within said lots, and cannot recover from a grantor a sufficient amount of land owned by said grantor adjoining said lots outside the limits of said town-site to make up a deficiency in the size thereof.[5]

Where, however, a block consisting of twenty-two lots had been purchased and a warranty deed received, and where, at the time of the purchase, a plat was exhibited to the purchaser which showed that the lots were 25 feet wide by 100 feet deep, it was held that the purchaser had a cause of action for damages when it was discovered that part of the lots were only 60 feet deep because of some mistake in the original plat, and that this was so regardless of whether the representations were made knowingly or by mistake.[6] And where a tract of land was located by a surveyor and the corners marked by stones, and the lines by furrows plowed to and from the corners, and the owner in offering it for sale stated the boundaries as they had been thus established, and represented to the purchaser that they were the true boundaries, and that the tract was the east 174 acres of survey No. 2, and the tract was conveyed and described as the "east 174 acres of survey No. 2," giving no field-notes, the tract as marked by the boundaries overlapping an adjacent survey on the south some 72 varas, this fact being unknown to the parties at the time of the

[1] Hoffman *v.* Johnson (Md.), 1 Bland Ch. 103.

[2] Hodges *v.* Denny (Ala.), 5 So. Rep. 492 [1889]; Doe *v.* Vallejo, 29 Cal. 386.

[3] Colter *v.* Mann, 18 Minn. 96; Rioux *v.* Cormier (Wis.), 44 N. W. Rep. 654; Richwine *v.* Jones (Ind.), 39 N. E. Rep. 460.

[4] O'Herrin *v.* Brooks (Miss.), 6 So. Rep. 844. *But see* Thompson *v.* Ladd, 169 Ill. 73.

[5] Clark *v.* Farnsworth (Kan.), 53 Pac. Rep. 93 [1898]; Leon, etc., Co. *v.* Dunlap (Tex.), 23 S. W. Rep. 473.

[6] Sears *v.* Stinson (Wash.), 29 Pac. Rep. 205.

sale, it was held that the grantor's warranty applied to the land pointed out by him at the time of the sale, though the description in his deed did not include the strip from which the grantee had been ejected.[1]

591. "More or Less"—Meaning of Words when Quantity is Stated.—The cases given in the last section can hardly be reconciled with a large number, unless it be on the ground that the element of misrepresentation, of fraud, or of mutual mistake did not exist in the cases here presented, or that the purchaser or grantee had the means and opportunity to determine the quantity and did not take pains to do so. These cases hold that the use of the words "more or less" in a deed, after enumerating the number of acres in a tract of land, implies a waiver, on the part of the buyer, of a warranty as to the specific quantity in a contract, and an agreement on the part of the seller not to demand more than the fixed price. If, on the one hand, there should be an excess or, on the other, a deficiency in the quantity named, it is understood that both parties are willing to abide by such presumptive or probable evidence of the quantity, but of which quantity neither pretends to have an accurate and perfect knowledge. The use of these words in a statement of the number of acres makes that statement descriptive merely, and it is not of the essence of the contract.[2]

The risk as to the quantity of land described is mutual; and if such quantity exceed or be less than that named, there can be no recovery on either side for the excess or deficiency, even though it be large.[3]

Where land is sold by the acre at a public auction, the vendor saying that he will sell it as a specific number of acres more or less, and that it shall be measured, the vendee is required to take it though the quantity be largely in excess of that specified at the sale and in the public advertisement.[4]

The addition of the words "more or less" to the description makes a sale of land one in gross, and not by the acre, even where the amount named is an exact multiple of the number of acres named. This has not been the universal construction, however, for the courts have sometimes held that the words did not imply a special agreement that the purchaser took the risk of the quantity, being held to cover only a *reasonable excess or deficiency* such as might be caused by differences in surveys or variations in instruments, or similar reasonable causes.

592. "More or Less"—Variation in Quantity Stated Permissible.—Some courts have taken an intermediate position and have held that a reasonable variance was permissible. As instances the words "more or less" have been held in the different states to cover a conveyance of real estate in which the amount of variation was as follows: In Kentucky an excess of 56 over 425,

[1] Meade *v.* Jones (Tex.), 35 S. W. Rep. 310.

[2] 15 Amer. & Eng. Ency. Law 717; Thayer *v.* Finton, 108 N. Y. 394 [1888]; Coleman *v.* M. B. Ins. Co., 94 N. Y. 229.

[3] 15 Amer. & Eng. Ency. Law 717.

[4] Ashcorn *v.* Smith (Penn.), 2 P. & W. 211. *And see* Delaware *v.* Smith, 1 Del. Ch. 1.

or of 283 over 2000 acres, or a deficiency of 11 under 98 acres was permitted; but an excess of 33 over 72 acres, or a deficiency of 67 under 610 (in the presence of fraud), was held to exceed the reasonable limit covered by the words "more or less."

In New York the courts have allowed a deficiency of 10 in 96, or of 5823 in 17,466, or of 5 in 75 feet; but the reasonable limit was held to have been exceeded when the deficiency was 9 in 98, 16 in 222, or 3 in 8 acres. New Jersey permitted a variation of 3 in 39, but refused to recognize a variation of 20 in 135 when there was a mistake, or of 3 in 15 in case of mistake.

In Maryland the words "more or less" have been held to include a deficiency of 28 in 173, 55 in 998, 104 in 482, 53 in 187, 14 in 100 acres; but a deficiency of 22 acres in 424 was held to exceed the limit. The state of Indiana has permitted a deficiency of 54 acres in 451, or of 12 in 42, but has refused to include in the expression a deficiency of 7 in 320 (in the presence of fraud), or of 37 in 140 (in the presence of fraud).

Massachusetts has upheld a conveyance when there was an excess of 3 in 85 or a deficiency of 50 in 220 acres, and Virginia permitted a deficiency of 160 out of 1100, but refused to permit a deficiency of 115 in 552, or of 135 in 900, when the vendor knew of the deficiency.

Alabama has permitted the words to include a deficiency of 31 in 500, but not of 25 in 100 acres; while the courts of Arkansas granted relief for a deficiency of 84 in 180, on the ground of gross mistake.

The courts of Minnesota allowed a deficiency of 2.85 in 20 acres; Mississippi, 20 in 100 acres.

Iowa has held the limit to be unreasonable when the deficiency was 8 in 30; Texas, 115 in 500; and North Carolina, 1 in 5.[1]

It has been held that such excess or deficiency ought not to exceed ten or fifteen per cent.[2] Another case held that twenty per cent was too great.[3]

593. "More or Less" when Land is Described by Metes and Bounds.—When the boundaries are defined by metes and bounds the grant will not be enlarged by the words "more or less." It is neither limited nor extended by the words, which are supposed to have been used, in the absence of positive knowledge of the boundaries or of the acreage, for the very purpose of avoiding a statement which should be conclusive on the parties.[4]

If, in a contract of sale, land is described by metes and bounds or by the insertion of the words "more or less" or equivalent words, the statement of the quantity of land, if found to exceed or be less than the amount named, will not entitle the purchaser or the seller to relief when it is discovered that the quantity stated is not correct, unless the difference be so great as to raise

[1] *See* 15 Amer. & Eng. Ency. Law 719, *and many cases cited.*
[2] Fannin *v.* Bellamy (Ky.), 5 Bush 663.
[3] Gentry *v.* Hamilton (N. C.), 3 Ired. Eq. 376.
[4] 15 Amer. & Eng. Ency. Law 720. *See* Lobit *v.* McClave (Tex.), 28 S. W. Rep. 726.

a presumption of fraud or of a gross mistake in some matter which has been made the essence of the contract.

595. "More or Less" Applied to Linear Distances.—When applied to distances the words "more or less" have the same significance. A distance designated as between two points described and as being "350 feet more or less" includes all between the points or monuments named though it be more than 350 feet.[1] The words "a little more or less" seem to have no special significance when compared with "more or less."[2]

596. "More or Less" in Trade or Commerce.—In the sale of personal property the words "more or less" are held to have no such meaning ordinarily as in the sale of land. Goods, wares, and merchandise are usually sold at the unit weight or measure, and the words "more or less" are inserted in order to cover variations of estimate due to differences in weight, errrors in counting, and diminution by shrinkage and other similar causes. Parol evidence will not be admitted to show that the parties intended to buy or to sell a different amount from that stated in their written contract.[3]

597. Excess or Deficiency — How Distributed. — When the distance between two corners is in excess of that called for by the field-notes, the boundary should be determined by apportioning such excess to the two surveys whose corners are found.[4]

Where the description of land in a deed calls for a legal subdivision of a section of surveyed land, the quarter-section corners being lost, and the section exceeding 640 acres in area, the division-lines of the fractions of the section are determined by a division *pro rata* of the lines of the section as they appear upon the ground.[5]

Where one purchases from the state the east half of a certain surveyed section, and another purchases the west half, and it afterwards appears that all of the east half except 67 acres is covered by a prior survey, of which fact the land commissioner has no knowledge, and all parties believe each purchaser has a full half-section, then there is a mutual mistake, and the purchaser whose land is short cannot recover any portion to make up the deficiency in his east half.[6]

The regulations of the United States General Land Office require that where the quarter-section corners of exterior sections bounded on the north or west by township or range lines cannot be found, the interior corner of any such section shall first be found and established; from which exactly forty chains shall be measured along the line in the direction of the township or range line, and at that point the quarter-section corner is to be placed: this

[1] Gonzales *v.* Leon, 31 Cal. 98 [1866].
[2] United States *v.* Fossat (U. S.), 2 How. 413; United States *v.* Estudillo, 1 Hoffm. L. Cas. 204; 15 Amer. & Eng. Ency. Law 722.
[3] 15 Amer. & Eng. Ency. Law 722.
[4] Knippa *v.* Umlang (Tex.). 27 S. W. Rep. 915.
[5] Eshleman *v.* Malter (Cal.), 35 Pac. Rep. 860.
[6] Creech *v.* Davidson (Tex.), 23 S. W. Rep. 995.

always leaves the excess or deficiency to the quarter directly on the township or range line. And it makes no difference whether the fraction contains more or less than the number of acres shown by the government field-notes. Where the statute of a state conflicts with the regulations of the United States Land Office on this subject, the latter must govern. Where the original quarter-section corners of interior sections cannot be found or proved, they are to be established at a point equidistant from the corresponding corners of the section.[1]

Where two surveys made by the same surveyor at about the same time call for a common division-line, and are mapped as adjoining, the fact that an excess exists in the amount of land included in one or both along the line of junction is not sufficient reason for separating them in favor of one subsequently locating on such excess;[2] but if a tract of land be described by metes and bounds, the monuments described or designated, or the lines bounding the tract located by a surveyor, and the boundaries or survey so located or designated as to leave a gore or strip of land intervening between the tract described and the adjoining estate, the limits of the tract conveyed will be confined to the monuments and lines described or located, and the gore or strip between the estates will not pass by the deed.[3]

A custom of surveyors of land to overrun the exact measures is admissible to show that the boundaries of an ancient grant described by courses and distances exceeded the distances given in the deed.[4] But the proof of such a custom must be certain and undoubted.[5]

598. Description by Lot Number of Map or Plan Referred to.*—Boundaries of land sold by plan with a brief description or memorandum, such as is used in real-estate offices, are generally controlled by the plan, and by monuments and lines marked upon it, even though the area be given. In a conveyance, a lot was described by reference to a schedule annexed, and the schedule consisted of four columns: in the first was the number of the lot on the plan of the estate, the number being "153*b*"; in the second column, headed "Description of premises," the lot was described as "a small piece marked on plan," in the third column noted as being "occupied by J. E.," and in the fourth column as containing "34 perches." At the time of making the contract of purchase a line had been drawn upon a plan, which was to scale, dividing the lot "153*b*" from the remainder of a larger lot.

The quantity called for in the schedule, and that included by the line so drawn upon the plan, by scale, and the area found by actual measurement of

[1] Knight *v.* Elliott, 57 Mo. 317 [1874].
[2] Stanus *v.* Smith (Tex.), 30 S. W. Rep. 262
[3] Frost *v.* Spaulding, 19 Pick. 445 [1837]; Reed *v.* Phillips (Tex.), 33 S. W. Rep. 986; Mendel *v.* Whiting (Ill.), 31 N. E. Rep. 431. *But see* Titus *v.* Morse, 40 Me. 348 [1855].
[4] Owen *v.* Bartholomew, 9 Pick. (Mass.) 520 [1830].
[5] Lawson on Usage 35; Wait's Engin. and Arch. Jurisp., § 609.

* *See* Secs. 613–618, *infra.*

the land itself, were found to differ. The court held that the statement that the land conveyed contained 34 perches was merely a false demonstration, that the prior description was sufficient to convey it, and that the deed passed only the portion actually marked off and shown on the plan as measured by scale.

Where the boundary-lines of lots conveyed by lot-numbers are incorrect or are wrongfully stated as to length, it will not prevent the whole of the lot as shown upon the plat from passing; and if there is a shortage on the plat in which the owner intended to convey all his property, such shortage will be divided as nearly as possible *pro rata* between the grantees of the respective lots.[1]

Where the monuments of the original survey of a town-site have been destroyed, the descriptive words in a plat of the town site are controlling as to the location of the town-site.[2] The map or plan referred to in a description stands upon the same footing as a monument, and if the map be a public record it is of even higher authority.[3]

If there be two descriptions of the land conveyed which do not coincide and are not of equal weight, the grantee is entitled to hold by that which is most beneficial to him.[4]

Where a fractional lot is conveyed, the grantee is bound by the distances given, even if reference is made to an official map.[5]

599. Monuments Designated on Map against Monuments on Land.—That which is most certain should control. A map or plat of an addition implies a previous survey and marking upon the ground so as to render admissible evidence of the existence and location of the stakes marking such survey.[6]

Where reference had been made to a map and also to a deed, which latter did not fix any monument at the starting-point which could be determined with accuracy, and where the line was described as terminating at "the base of the mountain" and then turning down at right angles and following down the base of the mountain, and the character of the country was such that witnesses might differ as to the location of these lines, but the map referred to represented all the natural and artificial objects found upon the land, such as streams, buildings, and roads, and there was conflict between the description as found in the deed and the boundaries laid down upon the map, it was held

[1] C. S. & C. R. R. Co. *v.* Tuttle, 7 Ohio Dec. 63.

[2] Sperry *v.* Wesco (Oreg.), 38 Pac. Rep. 623.

[3] Parks *v.* Loomis, 6 Gray 467; Lunt *v.* Holland, 14 Mass. 149; Vance *v.* Fore, 24 Cal. 443; Buchanan *v.* Roy's Lessee, 2 Ohio St. 263; Magoun *v.* Lapham, 21 Pick. 135; McIver *v.* Walker, 9 Cranch 173; Fuller *v.* Dauphin (Ill.), 16 N. E. Rep. 917 [1888].

[4] Melvin *v.* Proprietors, etc., 5 Met. 15; Estey *v.* Baker, 50 Me. 325, 525; Vance *v.* Fore, 24 Cal. 443; Lunt *v.* Holland, 14 Mass. 149; Glover *v.* Shields, 32 Barb. 380; Willard on Real Estate, 403; 3 Washburn's Real Prop. 333, 343; Colter *v.* Mann, 18 Minn. 96 [1871].

[5] Hostetter *v.* Los Angeles Terminal Ry. Co. (Cal.), 41 Pac. Rep. 330.

[6] Burke *v.* McCowen (Cal.), 47 Pac. Rep. 367.

that the description presented by the map must be adopted as the one most stable and the least likely to be affected by mistakes.[1]

Maps equally with descriptions, in a deed, must be interpreted with regard to the monuments found on the ground. Where the lines of a street on a map referred to in a deed differ from those laid out by the city before the platting of the land, the latter prevail.[2] The boundaries are determined by lines as actually run on the ground as shown by the surveyor's stakes, rather than the lot-lines as shown by the plat.[3]

A survey once placed upon the face of the earth must control a plan that is made from it, although the plan, when placed upon the earth, would locate the line elsewhere,[4] even though the grantee has not seen the line on the ground.[5] But if the boundary be between the grantor and the grantee, and the monuments are hidden and private and the grantee had no notice of them, then the courses and distances named in a plat to which a deed refers must govern rather than the line as actually located upon the land.[6]

A description of a deed conveying a lot and house thereon was referred to by lot and block numbers of a map of record. By the map the lot was only twenty-three feet four inches wide, and the house, erected long before the sale, was twenty-five feet wide and lapped upon the adjoining lot. The reference to the map was held so important that it was permitted to control in spite of the fact that the house itself constituted a monument in the field. The owner of the adjoining lot having succeeded in an ejectment suit, the courts refused an injunction restraining execution, and held that the house-owner had no equity although it was alleged that his grantor, who had formerly owned both lots, had represented that he was the owner of the house and lot, but had failed to state that he was at the time the owner of the next lot. It was held that the house-owner was put upon inquiry as to the width of his house-lot by the reference to the map in his deed.[7]

In like manner in the following description, a parcel of land was described as follows: "Commencing at a point on J. St. 100 feet from the corner of J. and F. Sts., thence S. along J. St. 50 feet, thence at right angles eastward 119 feet, thence northward 50 feet, thence westward toward place of beginning 119 feet, the same being the south ⅓ of lots 6 and 7 in block 16 of the town of St. P. proper." The town plat showed the line on J. St. to be 150 feet, but in fact it was only 145½ feet. One-third of the lots would give 48½ feet on J. St., while according to the survey 100 feet south of the corner would

[1] Vance *v.* Fore, 24 Cal. 436 [1864]; Jeffries *v.* E. Omaha Land Co., 10 Sup. Ct. Rep. 518.

[2] Hastings *v.* McDonough (App. Div.), 43 N. Y. Supp. 628.

[3] City of Decatur *v.* Niedermeyer, 168 Ill. 68.

[4] Stetson *v.* Adams (Me.), 39 Atl. Rep. 575 [1898]; Smith *v.* Boone (Tex.), 19 S. W. Rep. 702. *Semble*, Butler *v.* Vicksburg (Miss.), 17 So. Rep. 605.

[5] Smith *v.* Boone (Tex.), 19 S. W. Rep. 702.

[6] Whitehead *v.* Atchison (Mo.), 37 S. W. Rep. 928.

[7] Anglecey *v.* Colgen (N. J.), 9 Atl. Rep. 105 [1887].

give but 45½ feet on J. St. It was held that the south ⅓ of the said lots 6 and 7 passed by the deed.[1]

600. Conflict Between Plat and Field-notes of Public Land.—When the plat and the field-notes of the original survey of public land do not agree, the former must control since it represents the lines and corners as fixed by the surveyor-general and by which the land was sold.[2] In the absence of original monuments the plat will control.[3]

The return of a tract of land from the board of proprietors prevails over a map on file in the surveyor's office attached to the original survey, in case of an inconsistency between the two in defining the boundaries of the tract.[4]

Where land is bought at public auction, the purchaser having before him an official map showing the size of each parcel sold, and where the deed describes the land as a certain numbered lot shown on the map, and also by metes and bounds, and the descriptions do not agree as to the size of the lot, the dimensions on the map control.[5]

Where officers of a corporation were authorized to convey "the W. ½ of the E. ½ of lots 10 and 11" and the officers, after so describing the land, added without authority a specific description by metes and bounds, which they supposed covered the same property, it was held that the first description prevailed.[6]

If land be described by giving the number of the certificate of survey and not by metes and bounds, such number becomes an essential part of the description.[7] Where a surveyor establishes two initial points on the ground itself, and from these the remaining surveys are plotted in on a map, and in the plot calls are made for a river, the true course of which the surveyor has mistaken, the surveys must be run out as plotted, the calls for the river yielding to course and distance.[8]

Where lots are conveyed by numbers according to a plat and also as one piece of land bounded by "the Philadelphia and Morristown Railroad," which appeared on the said plan of streets as a platted street 120 feet wide, the center of which was a railroad right of way 66 feet wide, with a strip 27 feet wide on each side thereof intended by the city as a public street, it was held that the grantee's title as against the grantor extended to the middle of the street, subject to the existing rights of the railroad, the city, and other owners of lots.[9]

[1] Colter *v.* Mann, 18 Minn. 96 [1871].

[2] Beaty *v.* Robertson (Ind.), 30 N. E. Rep. 706 [1892], *many cases cited;* Elliott *v.* Gibson (Ky.), 29 S. W. Rep. 620; Turner *v.* Union Pac. Ry. Co. (Mo.), 20 S. W. Rep. 673.

[3] Lampe *v.* Kennedy, 49 Wis. 601 [1880].

[4] Allaire *v.* Ketcham (N. J. Ch.), 35 Atl. Rep. 900.

[5] Masterson *v.* Munro (Cal.), 38 Pac. Rep. 1106; O'Herrin *v.* Brooks (Miss.), 6 So. Rep. 844. *See* Chaflin *v.* Gantz (Sup.), 39 N. Y. Supp. 712.

[6] Novotny *v.* Danforth (S. D.), 68 N. W. Rep. 749. *But see* Waldin *v.* Smith (Ia.), 39 N. W. Rep. 82 [1888].

[7] Rogers *v.* Concho C. Co. (Tex.), 38 S. W. Rep. 656.

[8] New York & T. Land Co. *v.* Thomson (Tex.). 17 S. W. Rep. 920.

[9] Dobson *v.* Hohenadel (Pa. Sup.), 23 Atl. Rep. 1128.

601. Older and Later Surveys and Grants—Their Relative Value.—In case of conflict an older grant will prevail over a later grant founded on an older entry; the entry not being in evidence and nothing else appearing.[1] Where a junior survey was located between the lines of two older surveys,—east of one and west of another,—the older surveys must be determined by their field-notes, and, when ascertained, they fix the location and quantity of the junior dependent survey.[2] When the surveys overlap one another, the one first made will have the priority, especially when the second survey is bounded by express reference to the first. Calls of a second survey conflicting with monuments and calls of a first survey must yield thereto.[3]

In ascertaining boundaries from title-papers, he who has the oldest title is entitled to take his courses and distances, go where they may.[4] A call for the lines of the older survey, as that of an adjoiner, will control a call for a distance.[5]

Parol evidence is not competent to prove the existence of older and superior titles to land, since the grants and titles themselves are the best evidence.[6] Proof of a record of a prior location, and the marking of it on the ground, will not defeat a subsequent location, in the absence of proof of a discovery by the prior locators. The record and the marking are not sufficient to authorize the court to presume a discovery.[7]

There is no rule that if clauses in a description of land are repugnant, the first necessarily prevails over the last.[8]

603. Azimuths, Bearings, and Points of Compass—Meaning of Words.—"North" and "northerly" in a description in a deed have been held not to be synonymous.[9] The words "northerly and easterly" may be held more comprehensive in significance than "north and east," depending largely for their meaning upon the circumstances to which they are applied. If there be no object to which the course is directed, they must, at least in a description in the deed, be taken to indicate a direction due north or east; but when there are monuments to which they are applicable they may have their ordinary meaning in full force and yet the line or course may incline either way to any distance, so long as it tends toward the north and east; and in connection with these facts the words retain a definite and unmistakable meaning. The course will maintain its characteristic as northerly or easterly or both.[10] If there be no object mentioned to incline the course toward "east" or

[1] Hitchcock *v.* So. I. & T. Co. (Tenn.), 38 S. W. Rep. 588.
[2] Bennett *v.* Latham (Tex.), 45 S. W. Rep. 934 [1898].
[3] Van Amburgh *v.* Hitt (Mo. Sup.), 22 S. W. Rep. 636. *But see* Snyder *v.* Morris (Tex.), 38 S. W. Rep. 219.
[4] Quillen *v.* Betts (Del.), 39 Atl. Rep. 595 [1897].
[5] Worsham *v.* Morgan (Tex.), 28 S. W. Rep. 918.
[6] Woodbury *v.* Evans (N. C.), 30 S. E. Rep. 2 [1898].
[7] Smith *v.* Newell (U. S.), 86 Fed. Rep. 56 [1898].
[8] Rathbun *v.* Geer, 86 Conn. 421.
[9] Garvin *v.* Dean, 115 Mass. 577; Howard *v.* College, 116 Mass. 117.
[10] Foster *v.* Foss, 77 Me. 280; Irwin *v.* Towne, 42 Cal. 329; Abbey *v.* McPherson (Kan.), 41 Pac. Rep. 978.

"west," the word "northerly" is considered to mean due north.[1] "North" and "northward" have been held to mean due north.[2] "Northwardly," "westwardly," etc., in a description are held to mean due north, due west, etc.[3]

In naming one of the courses of a boundary of a county in the state of Ohio the words "thence north to the Great Miami" were held to refer to the originally surveyed section-line, although not running a true course.[4] The words "due west," "due east," etc., are held to mean exactly west, exactly east, etc., and to apply with equal propriety to those points whether the magnetic or the sidereal meridian is referred to.[5]

It frequently happens in descriptions that mistakes are made and the word "north" is used for the word "south." In such case the deed is not void for uncertainty if the intention of the parties is plain, as where the description reads, "south to the place of beginning," and it is necessary to go north to reach the place of beginning.[6]

Where boundaries called for as the north, south, east, and west boundaries are taken as the northeast, southeast, etc., boundaries, and describe a tract of five times the area the deed calls for, such deed will not be held void for uncertainty as a question of law, but the identity of the land is a mixed question of law and fact for the jury.[7]

604. Meridians, True or Magnetic.—Whether the line is to be run by the magnetic or the sidereal meridian must be determined by the circumstances of each case. In some states it may be determined by the statute or former decisions of the courts. In New Hampshire it was held to be part of the common law that when the meridian was not specially designated as the sidereal meridian, the courses in deeds of private land are to be run according to the magnetic meridian [of the year when the original survey was made].[8]

When the surveys of the state have been made by different meridians, some by the true and others by the magnetic meridian, a call "due west," made in a contract for the subdivision of the original section, has not a determinate meaning even by judicial determination. If the original survey were made by the magnetic meridian and subdivisions have been made, there arises a strong and conclusive presumption that such subdivision-lines were intended to be run by the magnetic meridian; and even when the original survey was made according to the true meridian in a subdivision, unless so made, in reference to the original courses, as to manifest an intention to be controlled

[1] Brandt *v.* Ogden (N. Y.), 1 Johns. 156.

[2] Jackson *v.* Reeves, 3 N. Y. 293; Currier *v.* Nelson (Cal.), 31 Pac. Rep. 531; Reed *v.* Knight, 87 Me. 181. *But see* Weare *v.* Weare, 59 N. H. 293.

[3] Seaman *v.* Hogeboom (N. Y.), 21 Barb. 298, 404; Craig *v.* Hawkins (Ky.), 1 Bibb. 53; Pratt *v.* Woodward, 32 Cal. 227.

[4] Commrs. of Warren Co. *v.* Commrs. of Butler Co., 4 Ohio N. P. 349 [1897].

[5] Wells *v.* Co., 47 N. H. 235 [1866].

[6] Marsh *v.* Ne-Ha-Sa-Ne Park Assn. (Sup.), 42 N. Y. Supp. 996. *See* Dunlop *v.* Kennedy (Cal.), 34 Pac. Rep. 92.

[7] Dwyre *v.* Speer (Tex.), 27 S. W. Rep. 585.

[8] Wells *v.* Co., 47 N. H. 235 [1866], *and cases cited.*

by the original courses, they would in general be run by the magnetic meridian, as that is the general usage in running lines. The question is in general a mixed one of law and fact to be determined by the terms of the calls and the extraneous circumstances attending each case.[1]

605. Measurements to and from Objects Described as Monuments.—In general, when premises are bounded on or by a monument, whether a stream, roadway, ditch, wall, fence, rock, or stake, the description is construed as meaning to the middle or center of that monument,[2] and therefore it would seem that, in general, distances should be measured to the center or middle of such boundaries. This, however, is not the universal practice, and little definite law can be cited to govern the cases.

The acknowledged practice of surveyors, the local custom and usage of the place, the particular circumstances surrounding each survey, the application and the adjustment of the description of the land by courses and distances to the property, may each and all have weight in determining how to apply such distances to the monuments described.

By the law of property, ownership is that which gives one the exclusive and free enjoyment of his possessions. Therefore if a man would erect a wall or fence, or dig a ditch, or set a hedge, he must confine his operations to his own land or possessions. He cannot encumber his neighbor's land with his fence any more than with his building. If, however, he has built a fence or dug a ditch upon his own land and then sells or grants away a part of it, bounding it on or by the fence or ditch without reservation, the center line will be the boundary. The actual point measured to, as recorded or proved, will govern.

In some localities it has become the custom for property owners to set the center of the posts of a fence upon the dividing-line, to which place, therefore, surveyors should conform in their measurements. In others the posts are kept wholly upon the soil of the builder, and the face of the rails to which the pickets or boards are nailed is considered the line; or if the boards are nailed directly to the posts, then the face of the posts to which the boards are fastened is taken as the line. In cities it is the usual custom for the one who builds and maintains the fence to keep the posts upon his own land. This is because every available inch or fraction of land is valuable and may be utilized for building. Fences erected upon a street-line are generally kept entirely within the lot. The extreme outside face of the wall or fence is taken as the line. This is because cities are very particular to prevent any encroachment upon the sidewalks, and parties who build out over or upon them may be required to take down and rebuild if they project their fences or buildings into the street.

[1] McKinney *v.* McKinney, 8 Ohio St. 423 [1858]; Wells *v.* Co., 47 N. H. 235 [1866], *and many cases cited;* Taylor *v.* Fomby (Ala.), 22 So. Rep. 910 [1897].

[2] Starr *v.* Child, 20 Wend. 149, *and cases cited.*

In walls and blocks in cities, the water-table or underpinning courses are generally taken as the limit of the street-line. This will be a matter of custom or ordinance in different cities, and may be wholly at variance. A newcomer in a community should inform himself as to the usages in vogue at the city engineer's office or from the established engineers of the place.

In the country, in farm surveying, where land is cheaper, the fences are frequently placed upon the line, so that its middle line is the boundary-line, and the fence is equally upon both property owners.

The general rule as to monuments undoubtedly is that the center of such monument, stake, stone, tree, rock, etc., is intended when lands are so defined. Even when highways and streams are referred to in deeds as the limits of the grant or conveyance, the middle is presumed to be the limit unless the contrary be clearly expressed. The real boundary, then, is the belt of land extending along the highway or stream between the margin and the center.[1]

Measurements from structures when designated in a description must be made in accordance with the intention of the parties, if that can be ascertained. Circumstances and conditions attending each case will lend their weight in determining that intention, as will the construction of the same language adopted in other and earlier cases decided.

A line described as "four feet north from the northerly side" of a building was held to mean four feet from the edge of the eaves,[2] but "eight feet four inches from the south side" of a building was held to be measured from the corner board and not from the outer edge of the eaves.[3]

Where a boundary-line was described as "commencing twelve and one-half feet east of [the grantee's] house," it was measured from the foundation of the house.[4]

Where, in an action to determine the true boundary-line between two city lots which are entirely covered by buildings erected many years ago, the court adopts a crack or seam between the buildings as the true line, the finding will not be disturbed.[5]

606. Measurements "to or along" a Road.—Whether measurements to a road or way are to the center or to the nearer side is a question that is not settled, but depends upon the particular circumstances of each case. Numerous cases have come before the courts, but no definite or satisfactory rule has yet been established. It was intimated in a recent Massachusetts case that where the boundary is a stream or way there was a reasonable presumption that measurements were made from the bank of the stream or from the side of the way, and that such a rule of presumption was well established

[1] Redfield, J., in Buck *v.* Squires, 22 Vt. 484.

[2] Millett *v.* Fowle, 8 Cush. 150 [1851]; Dickinson *v.* Amherst Water Co., 139 Mass. 212.

[3] Center St. Church *v.* Machias Hotel Co., 51 Me. 413 [1864]. *And see* Wise *v.* Burton (Cal.), 14 Pac. Rep. 678 [1887].

[4] Kendall *v.* Green (N. H.), 42 Atl. Rep. 178 [1894].

[5] Greer *v.* Powell (Iowa), 56 N. W. Rep. 440.

in measuring *to* a stream or way, but that there was little or no authority when the measurement was *from* the stream or way. The presumption is founded upon the common method and custom of measurement among surveyors, and it is believed to be correct. It may be controlled by evidence that the parties at the time established monuments, and such extrinsic evidence is admissible to aid in the construction of the deed.[1]

Where a highway is mentioned as the boundary-line and a piece of land is to be measured along said highway, there is no presumption that the chain was carried along the center of the highway in making the original measurements.[2]

A description of premises as extending west 72 feet from the northeast corner of the lot fixes the beginning point *not* at the center of the street on which the lot abuts, but at that portion of the platted territory set apart for individual and separate use, even though the plat in giving the sizes of the lots designates the measures to the center of the street.[3]

Land-line and *boundary* have been held to be synonymous and interchangeable terms.[4]

607. Measurements to Adjoining Tracts or Structures.—If land be bounded as extending to other land of the grantor or along another strip of land, ever so narrow, owned by the grantor, the margin of the land will be taken as the boundary. There is no reason to suppose that a party while describing one piece of land intended to convey half of another piece, as appurtenant to it. Land cannot be conveyed as appurtenant to other land; if conveyed at all, it must be as parcel of the land conveyed. Appurtenances are incorporeal.[5]

Chief Justice Gray has expressed it thus: "When land is described as bounded by other land, or by a building or structure the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant. But when the boundary-line is simply an object, whether natural or artificial, the name of which is used in the ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch or wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the lot granted."[6]

[1] Dodd *v.* Witt, 139 Mass. 63; Newhall *v.* Ireson, 8 Cush. 595; Motley *v.* Sargent, 119 Mass. 231; Hoar *v.* Goulding, 116 Mass. 132; Blaney *v.* Rice, 20 Pick. 62; Stewart *v.* Patrick, 68 N. Y. 450; Hamm *v.* San Francisco, 17 Fed. Rep. 119 *See* Walker *v.* Boynton, 120 Mass. 349; Dunham *v.* Gannett, 124 Mass. 151; Dickinson *v.* Amherst Water Co., 139 Mass. 212.

[2] Commrs. *v.* Morgan (Kan.), 52 Pac. Rep. 896 [1898].

[3] Montgomery *v.* Hinds (Ind. Sup.), 33 N. E. Rep. 1100.

[4] Henderson *v.* Dennis, 177 Ill. 547.

[5] Buck *v.* Squires, 22 Vt. 484.

[6] Boston *v.* Richardson, 13 Allen 146.

CHAPTER XXXI.

DETERMINATION AND PROOF OF BOUNDARIES.

611. Determination of Boundaries is Usually for Jury.—When property owners appeal to the decision of a court to settle their disputes and determine the boundaries of their land, the court will first inquire as to whether the deed or contract is complete and if the intention of the grantor is clear and conclusive. If it be so, the judge has but to interpret the language of the deed and render his judgment accordingly.

If there be any doubt as to what the grantor intended to convey, or if monuments and lines cannot be established, or disputes arise as to the location of those lines or lot corners, then it becomes a question for a jury. In such cases it is for the jury to determine which is the correct line, or what was the evident intention of the grantor. When the question is one of fact, the court will not decide it; for, however well satisfied the judge may be of the truthfulness and reliability of a surveyor's or any other witness's evidence, if it is disputed and disputable it cannot be taken from the jury.[1] Though it is the duty of the court to construe written instruments, yet it is the province of the jury to determine the boundaries of land in controversy from all the evidence, including the description in the deeds.[2]

The question as to which of two boundary-lines fixed by different surveys is the true line is for the jury.[3] If the description is capable of interpretation in two senses, one broader than the other, it may be interpreted by the jury from a survey carefully made on the ground by lines and monuments, from the specification of the quantity granted, and from a practical interpretation. by occupancy and otherwise, by the interested parties. In settling such a case the quantity of land specified, the boundaries named, and the survey as made are all to be considered, and by their united light the proper conclusion is to be reached.[4]

[1] Chief Justice Cooley in Herpel *v.* Malone, 56 Mich. 199 [1885]; Steigleder *v.* Marshall (Pa. Sup.), 28 Atl. Rep. 240; Dwyre *v.* Speer (Tex.), 27 S. W. Rep. 585; Humphrey *v.* Cooper, 183 Pa St. 432 [1898]; Parker *v.* Salmons (Ga.), 28 S. E. Rep. 681; Williams *v.* Hughes (N. C.), 32 S. E. Rep. 325 [1899]; Wilson *v.* Morris (Pa. Sup.), 33 Atl. Rep. 275.

[2] Cochran *v.* Smith (Sup.), 26 N. Y. Supp. 103.

[3] Macauley *v.* Cunningham, 60 Ill. App. 28; Ponet *v.* Wills (Cal.), 48 Pac. Rep. 483.

[4] Cavazos *v.* Trevino, 6 Wall. 773 [1867].

The true location of disputed lines is a question of fact for a jury where the testimony of the original surveyor and that of a subsequent one are in conflict,[1] and the location of such lines is not a question for a surveyor's opinion.[2]

612. Court should Leave Jury Unbiased to Determine Boundary.—The determination of the boundaries being a question for the jury, it is wrong for the court when a case rests upon the testimony of surveyors, though the trees originally marked or some of them are on the ground and have been examined by such jury, to charge that, owing to the length of time since the survey was made, "it is not to be expected that the monuments then made upon the ground are now to be found," because it tends to discredit the defendant's testimony.[3] Thus, in a controversy as to which of two trees marked the corner of a lot, it was held that it was for the jury to decide which tree was the corner, and that it was error for the judge to charge the jury that it was one or the other tree.[4] When, however, no testimony has been offered locating the monuments referred to in a deed, the judge may say to the jury that "by the record title the plaintiff has not fixed the boundary of the line . . . the line in dispute."[5]

Where land was conveyed as bounded on a certain street and running back a certain distance, it was held a question for the jury to determine whether the grantor referred to the street-line which was then apparent or the line of the highway as laid out and recorded.[6] It was held wrong to instruct a jury that they must satisfy themselves as to one disputed point, and that only in case that they could not satisfy themselves as to that point could they resort to any other point in the description. The jury should be left free to consider all the calls of the description, and to locate the disputed lines by all the evidence before them.[7]

When an ancient deed described land as "beginning on the sound at a ditch" which had become obliterated, it was held to be a question for the jury, aided by all the evidence of the facts; and this was so even though the starting-point had been settled as the corner of adjacent tracts, and there was still a ditch which if continued would meet the point in controversy.[8] The question being one of fact, it lies entirely within the province of the jury. If the judge make an equal division between claimants of a quarter-section which does not contain the full acreage, such division will not hold even though

[1] Herpel *v.* Malone, 56 Mich. 199 [1885].
[2] Stewart *v.* Carleton, 31 Mich. 270; Cronin *v.* Gore, 38 Mich. 381; Wilson *v.* Morris (Pa. Sup.), 33 Atl. Rep. 275.
[3] Cross *v.* Tyrone M. & N. Co. (Pa.), 15 Atl. Rep. 643 [1888].
[4] Berry *v.* Watson, 15 Atl. Rep. 618 [1888]; Davidson *v.* Shuler's Heirs (N. C.), 26 S. E. Rep. 340; Oliver *v.* Brown (Me.), 15 Atl. Rep 599 [1888]; Grief *v.* Norfolk & W. R. Co. (Va.), 30 S. E. Rep. 438 [1898]. *And see* Adams *v.* Half (Tex.), 24 S. W. Rep. 334.
[5] Chase *v.* Martin (Me.), 15 Atl. Rep. 68 [1888].
[6] Brown *v.* Fishel (Sup.), 31 N. Y. Supp. 361.
[7] Blum *v.* Bowman (C. C. A.), 66 Fed. Rep. 883.
[8] Roberts *v.* Preston (N. C.), 10 S. E. Rep. 983.

the tract has never been divided by a government surveyor, and though expert surveyors testified that such was the proper method of dividing it. It was maintained that the question as to location of the dividing-line was for the jury.[1]

If identity is the only question to be decided by the jury, and if it is satisfied as to the land which was granted, no further testimony should be required.[2]

The judge should not only leave it to the jury but he should leave it to their unprejudiced decision. If the instructions by the court to the jury are calculated to weaken the effect of either party's testimony or to mislead the jury, it will be an error which will give a new trial. Thus a remark by a judge, in referring to testimony of a surveyor, that "It would be a marvel in surveying if they found right at the end of the distance called for in the original survey the stump of the identical tree," was held not only to be inaccurate as to general proposition, but was calculated to unduly weaken the effect of the surveyor's evidence, and was error.[3]

However clearly, conclusively, and absolutely a surveyor's evidence may determine the boundaries of an estate, the question will not be taken from the jury unless the court can determine the parties, the tract, and its boundaries from the instrument itself. If they be disputed, the court will submit the determination of these questions to a jury. In a recent case a surveyor testified that two corners were found upon the ground, and that the line should be half-way between; that he ran a line dividing the distances equally, and that the distances checked; that it followed a line of blazed trees which were original line-trees, and that at about the right distance were the remains of a pine stump, the bearing-tree. Yet, with this most satisfactory survey, the question was given to the jury.[4] It will be seen that facts and conditions which might leave no doubt in the minds of surveyors will not be conclusive with a judge. However well satisfied he may be of the true location, he must leave it to the opinions of jurymen who may or may not have more than ordinary intelligence.[5]

The legal proposition that what constitutes a boundary in a deed is a fact for the jury is too well founded to be controverted, and the boundary may be proved by any kind of evidence which is competent to prove any fact.[6]

From what has been said it cannot but be evident that success in disputes

[1] McKey *v.* Hyde Park, 10 Sup. Ct. Rep. 512.

[2] Blake *v.* Doherty, 5 Wheat. 359. *And see* also Raymond *v.* Coffey, 5 Oreg. 132 [1873]; Brown & Rockwell *v.* Willey, 42 Pa. St. 205; Waterman *v.* Johnson, 13 Pick. 261.

[3] Bughman *v.* Byers (Pa.), 12 Atl. Rep. 357 [1888]; Woodbury *v.* Venia (Mich.), 72 N. W. Rep. 189 [1897].

[4] Higgins *v.* Ragsdale (Cal.), 23 Pac. Rep. 316; Reast *v.* Donald (Tex. Sup.), 19 S. W. Rep. 795.

[5] *Note.*—A plea for special juries on special subjects. A jury of twelve ordinary men is no more competent to judge technical questions of *surveying* than of medicine or of *law*.

[6] Brown & Rockwell *v.* Willey, 42 Pa. St. 205; Opdyke *v.* Stephens, 4 Dutcher 89.

of boundaries depends chiefly upon knowing what to present and how to present the case strongly and plainly before the jury. A case will be best handled by an attorney well versed in the law of boundaries and with a comprehensive knowledge of surveying methods and practical experience in the field, since so much depends upon the practical application of the description in the deed to the subject-matter, the estate.

613. Maps and Plans Referred to in a Deed Become a Part Thereof.*—When a deed refers to another deed, map, survey, or record of judgment, the instrument referred to becomes a part of the deed, and both should be construed together.[1] When a plat is referred to as descriptive of the natural boundaries of land conveyed, it must be considered as giving the true description as much as if it were embodied in the deed.[2] When a deed, after giving the description of the premises conveyed, states that all the premises are situated in a certain section, township, etc., "according to the map drawn on back hereof," such a plat becomes a part of the deed and a descriptive part of the subject of the conveyance.[3] A reference to a recorded plat for description makes the plat a part of the deed, so far as it affects the location of the lot with respect to surrounding lots.[4]

The plat referred to cannot be presumed to be inaccurate, and it may be regarded as more fully representing the intention of the parties than the language of the deed so far as fixed monuments are concerned. Where such plat shows a single line for the stream as a boundary, it will be taken as representing the center of the stream, and not the banks, as it would if another line were drawn for the margin.[5] If the map does not contain the number by which the lot was designated and does not furnish sufficient data for locating the lot, parol evidence may be admitted to identify the lot on the map.[6]

614. Description Complete, and General Reference to Maps and Deeds.—If the description in the deed be clear and complete and there be no apparent ambiguity on the face of it, the fact that there is added a statement that land conveyed is the same described in a certain recorded agreement between the grantor and another party will not justify a reference to such agreement to show that a less amount of land was conveyed than was

[1] Heffeman *v.* Otsego W. P. Co. (Mich.), 43 N.W. Rep. 1096; Blum *v.* Rice (Tex.), 32 S. W Rep. 1056; St. Louis *v.* Mo. Pac. R. Co. (Mo.), 21 S. W. Rep. 202; McCullough *v.* Olds (Cal.), 41 Pac. Rep. 420; Green *v.* Doane, 15 Cal. 304; Davis *v.* Rainsford, 17 Mass. 207; Glover *v.* Shields, 32 Barb. 374; Birmingham *v.* Anderson, 48 Pa. St. 253; Noonan *v.* Lee, 2 Black 504; Wait's Engin. & Arch. Jurisp., Secs. 213–233.

[2] Slauson *v.* Goodrich T. Co., 75 N. W. Rep. 574; Northern Pac. R. Co. *v.* Scott, etc., Co. (Minn.), 75 N. W. Rep. 737.

[3] Piper *v.* Connolly, 108 Ill. 646 [1884].

[4] Smith *v.* Young, 160 Ill. 163.

[5] Piper *v.* Connolly, 108 Ill. 646 [1884]. *See* Jefferies *v.* East Omaha Co., 10 Sup. Ct. Rep. 518; O'Brien *v.* Flynn (Mass.), 33 N. E. Rep. 500.

[6] Redd *v.* Murry (Cal.), 30 Pac. Rep. 132.

*See Secs. 598, 599, *supra*.

described in the deed;[1] and where the description by metes and bounds is followed by the words "or the one-fourth part of all the land that my father M. died seized and possessed of," the clause will not control the description by metes and bounds so as to include other land willed by the deceased.[2]*

It is equally well settled that nothing will pass by a deed except what is described in it, whatever the intention of the parties may have been. The rule in such cases is that "When a deed contains an accurate description of permanent boundaries capable of being ascertained, a general reference, in addition, to the premises as in the possession of the grantor or grantee will not pass title to land outside of the boundaries given." But little weight can be ascribed to a statement of the quantity of land in the deed, as that is followed by the words "be the same more or less," and according to settled rules cannot be held to affect the quantity of land included within specified boundaries, when those are clearly and certainly ascertainable.[3]†

615. Maps and Plans Referred to are Evidence of Boundaries.—A map, plat, or document referred to in a deed for the description of the boundary and land conveyed is admissible in evidence of such boundaries.[4] A sketch or a plat not marked with courses and distances, made by a non-expert grantor and annexed to his deed, is admissible with the deed as an illustration.[5] A prior bond for a conveyance which has been made in exchange for a deed may be referred to, in construing the deed, to show the intention of the parties as respects the sale, in connection with other circumstances.[6]

Where plats and maps have been made of property, as where an estate has been divided up into building-lots, and conveyances have been made by the lot-number and a mere reference to the map, the grantee takes only so much as is shown on the plat.[7]

616. Copies of Maps and Records as Evidence.—To make copies of maps and records evidence in court they should be accompanied by the certificate of the public officer to whose custody such maps and records have been legally consigned. A true copy of such documents must be made and furnished. A certificate of a public officer that certain facts appear of record in his office,[8] or a certificate by the surveyor that "the courses and distances are correctly laid down from official surveys made by me," without more, will not be received.[9] Certificates of surveyors attached to the duly certified copy of a

[1] Jones *v.* Webster W. Co., 85 Me. 210; McCullough *v.* Olds (Cal.), 41 Pac. Rep. 420.

[2] Midgett *v.* Twiford (N. C.), 26 S. E. Rep. 626.

[3] Jackson *v.* McConnell, 19 Wend. 174; Jackson *v.* Moore, 6 Conn. 706; Thayer *v.* Finton, 108 N. Y. 394; Jones *v.* Smith, 73 N. Y. 205.

[4] Taylor *v.* McConigle (Cal.), 52 Pac. Rep. 159.

[5] , 18 S. E. Rep. 680.

[6] Piper *v.* Conolly, 108 Ill. 646.

[7] O'Brien *v.* Flynn (Mass.), 33 N. E. Rep. 500.

[8] Francis *v.* Newark (N. J.), 33 Atl. Rep. 853; Goodwin *v.* McCabe, 75 Cal. 584.

[9] Major *v.* Watson, 73 Mo. 661 [1881].

* *See* Sec. 548, *supra.*

† *See* Secs. 588–597, *supra.*

map from the archives of the land office are not admissible to prove disputed facts.[1]

A sketch of the survey under which a certificate was issued, taken from a map of the county wherein the land was situated, together with the certificate of the commissioners reciting that the sketch was a true copy from such map, and that the map was made by a certain person, giving the date, and that it had been in the land office in use as the official map of said county between certain dates, is admissible.[2] Where a registered copy of a deed is duly admitted in evidence, the registry is evidence that the deed was executed.[3]

Parol evidence of the contents of a deed is not admissible when the deed has been lost, unless it appear that inquiry for it was made of a person to whom it was last sent, and that it is not in the possession of the party claiming under it.[4]

617. Admission of Field-notes as Evidence. — The field-notes of a deceased surveyor, showing the boundaries of an old survey which it is proved are identical with some of the boundaries of the tract in dispute, are admissible as evidence to show the original location of such boundaries.[5] When a survey is made without legal authority, copies of the field-notes are not admissible as evidence even though certified from the General Land Office.[6]

When the provisions of an act require deputy surveyors to enter surveys in a survey-book, which requirement is directory only, the neglect of the surveyor to so enter a survey will not deprive an owner of his title.[7]

618. Government Maps as Evidence.—Maps and field-notes made by government surveyors (which term includes county surveyors) in obedience to general or special statute laws, and filed in the proper public offices designated, are good evidence of the true shape and location of the land.[8]

Where statutory law requires a plat of a survey of lands applied for, with the field-notes thereof, to be filed with the application for purchase, an application with the plat, but without the field-notes, is insufficient.[9]

619. Testimony of Old Inhabitants as to Location of Boundary Lines.* —The determination of boundaries of land is frequently a question not so much of surveying as it is of proof by witnesses, whether by surveyors or by former owners, or by early inhabitants of the neighborhood. Often a case will go to the jury on the evidence of such witnesses who have sworn to the existence of monuments or marks upon the ground, which if established by

[1] Keuchler *v.* Wilson (Tex.), 18 S. W. Rep. 317.
[2] Rogers *v.* Mexia (Tex.), 36 S. W. Rep. 825.
[3] Hathaway *v.* Spooner, 9 Pick. 23 [1829].
[4] Trindle *v.* Edwards (Tex.), 19 S. W. Rep. 772.
[5] Stanus *v.* Smith (Tex.), 30 S. W. Rep. 262. *See* Stiles *v.* Estabrooks (Vt.), 29 Atl. Rep. 961.
[6] Von Rosenberg *v.* Haynes (Tex.), 20 S. W. Rep. 143.
[7] Wilson *v.* Homer, 59 Pa. St. 155.
[8] Redmond *v.* Mullenax (N. C.), 18 S. E. Rep. 708.
[9] State *v.* Forrest (Wash.) 43 Pac. Rep. 51.

* *See* Sec. 630, *infra*.

such testimony will determine the boundaries of the land independent of any efforts made by surveyors, or of conclusions arrived at by them. If witnesses come into court and swear that in a certain place a monument existed or a certain marked tree was cut down, and that it was regarded by the community as a well-established corner or monument, it may be accepted by the jury and court as the true line no matter how many surveyors testify to the contrary.[1]

620. Traditional Proof of Boundaries. — At common law traditional proof was received only when the boundaries in question were public or *quasi* public, or when the private line was coincident or dependent on such public boundary or monument. In this country the rule has not been strictly adhered to, and declarations in regard to private boundaries by persons since deceased, who shall appear to have been in a situation to possess the information and who were not interested, have been admitted in evidence, as, for example, the declarations of the surveyor who originally ran out the lines, or of some members of his party.[2] Some jurisdictions require that the declarant shall have been in possession as owner at the time, and shall have been engaged in pointing out the boundary in question.[3]

This relaxation of the rule and its application to private boundaries is doubtless due to the fact that a single surveyed line is common to a number of estates and thus becomes a matter of general public interest and a *quasi*-public boundary.[4] Declarations of a deceased person as to the boundaries of his land, though not made on the land, have been admitted as evidence between other parties where it is shown that the deceased had means of knowledge of such boundaries and no apparent interest to misrepresent. Such declarations are generally admissible to prove public boundaries and public ways.[5] Declarations of a disinherited person since deceased, made before any controversy has arisen in reference to private boundaries, are admissible as evidence; and this is so even though the declarant was a slave at the time, since, if alive, he would now be competent to testify.[6] The declarations of an owner since deceased, when leaving a strip of land open, explaining his intentions and reasons for so doing, are properly admitted in evidence in behalf of a person claiming under such prior owner.[7] Declarations by persons who have private interests cannot be introduced even though they pertain to matters of general interest.[8] The statements must have been made by persons now dead, and in some states they are confined to ancient boundaries, and to declarations of deceased *owners*, made while in the act of pointing out their own boundaries. In such a case the declaration need not be against

[1] James *v.* Lewis, 50 N. Y. Supp. 230 [1898]; Van Dusen *v.* Shiveley (Oreg.), 39 Pac. Rep. 76; Woodbury *v.* Venia (Mich.), 72 N. W. Rep. 189 [1897]; Collins *v.* Sutton (Va.), 26 S. E. Rep. 415.

[2] Sexton *v.* Hollis, 26 S. C. 236; Elliott *v.* Pearl, 10 Pet. 412.

[3] Curtis *v.* Aronson (N. J.), 7 Atl. Rep. 886.

[4] Best's (Chamb.) Evidence 474.

[5] Lawrence *v.* Tenant (N. H.), 15 Atl. Rep. 543 [1888].

[6] Whitehurst *v.* Pettipher, 87 N. C. 179 [1882], *and cases cited.*

[7] Quinn *v.* Egleston, 108 Ill. 248 [1883].

[8] Best's (Chamb.) Evidence 474.

interest or in disparagement of title. They are received when nothing appears to show an interest to deceive or misrepresent.[1] If declarations have been made against one's own proprietary or pecuniary interests, they are admissible in some courts if the declarant be dead; but disability, even though equivalent to death, does not render such declarations admissible: he must be deceased.[2]

In a recent South Carolina case the opinion was expressed that three things were necessary to admit hearsay reports and declarations of them: (1) that the boundaries must have been ancient; (2) that the declarant must be dead; (3) that he must have been in a position to know the boundary, as the surveyor or one of the chainmen who originally ran the lines. This is an exception to the general rule which excludes "hearsay" evidence, and it has been extended so as to render such testimony admissible in cases of boundaries between private estates, and to admit the declarations of deceased persons who shall appear to have been in a situation to possess the information, and who were not interested, as, for instance, the declarations of surveyors, chain-carriers, etc. The courts, however, are against extending such exceptions to a well-settled and highly salutary rule of evidence any further.[3]

A subsequent survey and location of a dividing-line will not suffice. This would allow a perversion of the rule against hearsay evidence, and permit any one at any time, without any special information on the subject, and without any responsibility, and in the absence of interested parties, to run a supposed dividing-line at his pleasure and thus make admissible testimony which otherwise would, and should, be excluded. The information of the declarant must be from his own observation and experience and not what has been imparted to him by others.[4] A witness whose only knowledge is derived from the fact that an *owner* of adjoining land ran the dividing-line in the presence of the witness, it not being shown that the adjoining owner *was a surveyor* and who *originally* located it, nor that *he was dead*, is incompetent to testify to the location of a boundary-line.[5] Declarations, at the time of making survey, by surveyors who are since deceased have been admitted a spart of the *res gestæ*.[6] A witness no doubt has the right to testify at least as to what he saw, and such testimony is primary and in no sense secondary or "hearsay"; but when a witness seems to have acquired a very full knowledge which must necessarily have been derived from information imparted, as well as from observation, how shall the court distinguish as to how much of the testimony was derived from one source, and how much from the other?[7]

[1] Curtis *v.* Aronson (N. J.), 7 Atl. Rep. 886 [1887].

[2] Best's (Chamb.) Evidence 474.

[3] Mima Queen *v.* Hepburn, 7 Cranch 290. *And see* 39 Alb. Law Jour. 134 [1889]; Smith *v.* Cornett (Ky.), 38 S. W. Rep. 689.

[4] 39 Albany Law Journal 134 [1889]. *See* Blythe *v.* Sutherland, 3 McCord 259, *and* 1 Greenleaf's Evidence, § 145.

[5] Alexander *v.* Gossett (S. C.), Sup. Ct., Oct. 12, 1888.

[6] Barclay *v.* Howell's Lessee, 6 Pet. 498, referred to by McLean, J., in 10 Pet. 714; Birmingham *v.* Anderson, 40 Pa. St. 506.

[7] Alexander *v.* Gossett (S. C.), 39 Alb. L. Jour. 134 [1888].

Where the location of a private boundary depends upon showing a section-line, the latter may be shown by proof of general reputation.[1] A witness having knowledge may testify whether the lines described in a deed, when applied to the face of the earth, surround the lot.[2]

On an issue of the location of a survey whose boundaries depended on the location of other surveys, opinions of surveyors as to how they would locate the latter, and that if such surveys were located in a certain manner it would be contrary to the field-notes for the same, are inadmissible, since such testimony involves a question of law.[3]

Where several witnesses testified that the patentee agreed that the true division-line should be "the top or ridge of the mountain between Lot and Second creeks," and the deeds only called "to the top of the ridge, thence running with the dividing-ridge between Lot creek and Second creek," such deed was held to establish the division-line as supported by the evidence.[4]

A discrepancy between calls of a plat and marks on the ground may be explained by evidence that the tract is larger than the plat called for, and that the lots as then occupied were of a certain length, corresponding to the original tract.[5]

621. Testimony of Old Inhabitants against Paper Title.—When the dividing-line of two estates is in controversy and it appears that there is no record of the original monuments or surveys, the testimony of those who remember where the corners of lines were, as shown by a fence erected nearly forty years before the trial and subsequently removed on becoming dilapidated, will control in favor of the party who claims to such fence and who has occupied the premises for more than twenty years prior to the bringing of an action, as against the paper title of the parties and the testimony of many witnesses that they do not remember any such fence and that they have never seen it.[6]

Evidence of marks on trees claimed to be line-trees is admissible.[7]

622. Ancient Maps and Documents.—Strictly, an ancient document must be so old as to be beyond living memory, but the idea of an ancient document has been identified with a possession for thirty years.[8] An ancient document, as the term is usually employed in the law of evidence, is a document which is not less than thirty years old. In some cases it has been declared that the map or deed should be more than thirty years old, and in exceptional

[1] Mullaney *v.* Duffy (Ill. Sup.), 33 N. E. Rep. 750.

[2] Carter *v.* Clark (Me.), 42 Atl. Rep. 398 [1898]. *And see* Allen *v.* Worsham, 49 S. W. Rep. 525 [1899].

[3] Fulcher *v.* White (Tex.), 48 S. W. Rep. 881 [1899].

[4] Grigsby *v.* Combs (Ky.), 21 S. W. Rep. 37.

[5] Kron *v.* Daugherty, 9 Pa. Super. Ct. 163 [1899].

[6] Richwine *v.* Presby. Ch. (Ind.), 34 N. E. Rep. 737.

[7] Greif *v.* Norfolk & W. R. Co. (Va.), 30 S. E. Rep. 438 [1898].

[8] *See* Gilbert on Evidence (2d ed.), pp. 95, 102; Greenleaf on Evdce., § 507; Taylor on Evdce., § 659; Clark *v.* Owens, 18 N. Y. 437.

instances documents which are twenty-five, twenty-eight, or nearly thirty years old have been admitted as evidence.[1]

Ancient plottings or plans and field-notes made by a surveyor are inadmissible to prove boundaries as an ancient map.[2] The courts distinguish field-notes from recitals in deeds, on the ground that the latter are contained in documents which constitute transactions in reference to the land. A certified copy of the record of a deed has been held not admissible as of an ancient instrument unless the deed was properly of record.[3]

623. Computing the Age of a Document.—In computing the age of an ancient document to determine whether or not it is an ancient instrument within the rules of evidence, the time is usually reckoned from the date of the execution. This rule is not universal, but is modified under some circumstances in reference to wills. The time is reckoned up to the date when the instrument is offered as evidence, and a document which is thirty years old at that time is an ancient document even though it may have been less than thirty years old when the suit was begun. Generally a document will prove itself to be an ancient document, and will be admitted as evidence without proof of its being authentic or of having been executed, as by calling the attesting witnesses, or by proving their handwriting, or in any other manner. This rule applies only in the absence of fraud or in the absence of proof that the instrument is invalid, which must appear on the face of the instrument, and only when there is proof that it comes from the proper custody. In some instances the courts have held that it must be shown that possession was held or action taken in accordance with the provisions of the instrument.

If there are erasures or interlineations or mutilations, the presumption of its genuineness is overcome and it must be proved in the usual way. The instrument should come from a proper custody, such as that in which it might reasonably be expected to be found. If it be not proven to have come from such custody, then it must be proven in the usual manner. It has been held that the custody need not be the most proper custody. The ancient document should be shown to have been in the possession or custody of parties to whom it would naturally or reasonably have come, or some explanations should be offered as to why or wherefore the possession was unusual. Registry offices, church records, public and private libraries and museums, may be proper custodians of deeds and other papers which are offered in evidence. Relatives and descendants of grantors and grantees, into whose possession such papers might reasonably and properly come, may be proper custodians of such documents.

There is some confusion in the decisions as to how far it is necessary to show some act performed or some possession acknowledged in accordance

[1] 2 Amer. & Eng. Ency. Law (2d ed.) 322.

[2] Boston Water-power Co. *v.* Hanlon, 132 Mass. 483.

[3] Settegast *v.* Charpiot (Tex.), 28 S. W. Rep. 580.

with the terms of the document. In this country it is pretty well settled that evidence of possession is alone sufficient authentication of the deed to show it to be ancient, but there is a difference of opinion as to whether the proof of possession under the deed is necessary to its admission in evidence. In some states such proof is absolutely required, while in others the deed is admitted in evidence where no possession is shown, if there be some other evidence to corroborate its genuineness.

It is the prevailing doctrine that the length of possession necessary, where that alone is relied upon, is thirty years; but where there is other evidence tending to corroborate the testimony, this rule has been relaxed. In New York it has been held that evidence of possession of part of the premises is sufficient.

Facts and circumstances must be shown to establish the age of the document as thirty years or more, in order to make it admissible under the rule. Generally it is not enough that the document purports to be ancient. Ancient documents are most frequently employed to establish boundaries both of public and of private lands, also to identify lines as by an ancient deed.

If an ancient document be not accounted for, so that some proof of its genuineness is necessary, or if the document, while not ancient, be yet sufficiently old to make such proof difficult, very slight proof will be sufficient in comparison with what will be required of very recent transactions.[1]

In some states old documents containing information as to the location of private boundaries, although not constituting deeds of ownership, are admissible.[2]

The words "ancient documents" have been held to include deeds, maps, wills, leases, bonds, powers of attorney, receipts, letters, and in fact almost any document which from its nature is evidence of the matter of fact in issue in any particular case. One of the most frequent instances of ancient documents is that of maps and surveys introduced for the purpose of showing boundary-lines of the government subdivisions and of private estates. In such cases it may include the map or plat of the survey, the field-book or notes kept by the surveyor in making the survey, or letters and reports made by the surveyor upon the subject of the survey.[3]

An old map which is well known and accepted as such has been held admissible in evidence in an action involving boundary-lines.[4] Where a description contains the phrase "to and along the line," the true location of of which line is uncertain, maps in common use at the time are admissible to show the location and name of the line.[5] An old map was admitted to show

[1] 2 Amer. & Eng. Ency. Law (2d ed.) 330–332.

[2] Hathaway *v.* Evans, 113 Mass. 264; Morris *v.* Cullanan, 105 Mass. 129; Sparhawk *v.* Bullard (Mass.), 1 Metc. 95; Dobson *v.* Finley (N. C.), 8 Jones 495, —all cases of recitals in old deeds.

[3] 2 Amer. & Eng. Ency. Law (2d ed.) 323. *But see* Boston Water-power Co. *v.* Hanlon, 132 Mass. 483.

[4] Taylor *v.* McConigle, 52 Pac. Rep. 159.

[5] Hanlon *v.* Union Pac. Ry. Co. (Neb.), 58 N. W. Rep. 590.

the boundaries of a tidal creek, since filled in, in a suit between private parties.[1] Streams mentioned in an old survey, no longer capable of being located by the names given, may be identified from maps of contemporaneous surveys.[2]

624. Maps and Documents Not Received as Evidence.—Deeds and maps which may be used by a surveyor to assist him in refreshing his memory and as data from which to testify, and which *when sworn to as correct* are admissible as testimony, should be distinguished from maps and plans which may be introduced directly as evidence of what they contain. In the one case it is the testimony of the surveyor which is received, based upon or strengthened by the map, while in the other the map alone is received for what it may contain.[3]

An *unofficial* plat made by a surveyor may be admitted in evidence to explain and illustrate his testimony in regard to the surveys and measurements he has made.[4] It may be admitted only in connection with his testimony and not as independent evidence.[5]

It is proper to permit the jury, when it retires, to take with it the report of the surveyor and a map of the premises attached to the report, to which references had been made to explain testimony.[6]

A county map, filed in the state comptroller's office, when it is not shown when, and by whom, and for what purpose it was made or how long it had been on the public files, and where there was no statute which required the comptroller to cause such maps to be made and filed in his office, will not be received as evidence.[7] A map recently made for the use of the assessors of the town, but not verified as to its correctness, is not admissible as evidence to prove the location of boundary-lines.[8] In California a plat of a survey made by a county surveyor is not admissible as evidence unless it is made out and certified to as provided by statute.[9]

625. Evidence of Declarations by Deceased Persons.*—The declarations of a deceased person in relation to the location of a particular corner or marked boundary-line dividing his lands from those of another are admissible in evidence in a trial to determine the boundaries between subsequent owners or claimants.[10] The declarations should not be subject to suspicion of bias

[1] Drury *v.* Midland R. Co., 127 Mass. 571. *See also* Adams *v.* Stanyan, 24 N. H. 405.

[2] Kain *v.* Young (W. Va.), 24 S. E. Rep. 554; Taylor *v.* McConigle, 52 Pac. Rep. 159; Hanlon *v.* Union Pac. Ry. Co. (Neb.), 58 N. W. Rep. 590.

As to how far the history of a county or community is admissible as evidence to establish boundaries or title to lands in dispute, see Roe *v.* Strong (N. Y.), 14 N. E. Rep. 294 [1888].

[3] Wardlow *v.* Harmon (Tex.), 45 S. W. Rep. 828 [1898].

[4] Goldsborough *v.* Pidduck (Ia.), 54 N. W. Rep. 431.

[5] Tinner *v.* United States (C. C. A.), 66 Fed. Rep. 280–289; McVey *v.* Durkin (Pa.), 20 Atl. Rep. 541 [1890]; Taylor *v.* McConigle (Cal.), 52 Pac. Rep. 159 [1898].

[6] Wardlow *v.* Harmon (Tex.), 45 S. W. Rep. 828.

[7] Donohue *v.* Whitney (N. Y. App.), 30 N. E. Rep. 848.

[8] Donohue *v.* Whitney (N. Y. App.), 30 N. E. Rep. 848.

[9] Doherty *v.* Thayer, 31 Cal. 140 [1866].

[10] Halstead *v.* Mullen, 93 N. C. 252 [1885]; Smith *v.* Headeick, 93 N. C. 210.

* *See* Sec. 620, *supra*.

from interest of the deceased owner, and a mere general statement or claim that certain land was in his boundary, or statements as to where the lines would run, or that he owned the land, without referring to any corners or marked lines, is inadmissible.[1] A witness cannot testify as to statements made to him as to the location of boundaries by persons who are alive and can testify.[2]

It is not necessary to show the knowledge or means of information of such deceased person in order to make his declarations admissible. If such knowledge or means of information are not shown, it only goes against the weight of evidence and does not determine its admissibility.[3]

Declarations of the plaintiff's grantors, since deceased, made when in possession of a lot, as to its location and as to what the true line of a street was, are admissible in evidence.[4] Declarations of a borough regulator who had run the lines of lots in question are admissible to prove where the dividing-line was actually located,[5] as are the declarations of the common grantor, made while the owner of both tracts, as to the location of the lines between them,[6] or declarations made at the time he sold the land to subsequent purchasers.[7] A sheriff cannot testify as to which one of two maps, that equally answer his description, he referred to in a deed executed by him, the land being incapable of identification.[8]

Parol evidence that the grantor, soon after the conveyance, ran out the line and marked the trees on it, and that the grantees cut trees up to such line, is admissible to aid in the construction of the deed:[9] Evidence that corner trees were marked on the boundaries of the land in dispute, and that, when one marked tree had disappeared, witness marked another to show where it had stood, was competent.[10]

The declarations should have been made when the deceased person was pointing out or marking the boundaries or discharging some duty relating thereto.[11] A witness cannot testify to what a deceased surveyor told him as to where he had located a certificate.[12]

The fact that the deceased person was a son-in-law of the former owner and carried the chain when such owner had some lines run, but the lines were not shown to be the lines in question, will not render his declarations admissible as evidence in regard to the boundaries.[13]

[1] High *v.* Pancake (W. Va.), 26 S. E. Rep. 536.
[2] Smith *v.* Cornett (Ky.), 38 S. W. Rep. 689.
[3] Payne *v.* Crawford (Ala.), 14 So. Rep. 854.
[4] Elgin *v.* Beckwith (Ill.), 10 N. E. Rep. 558 [1887].
[5] Haupt *v.* Haupt, 15 Atl. Rep. 700 [1888].
[6] Sharp *v.* Blankenship (Cal.), 21 Pac. Rep. 842.
[7] Austin *v.* Andrews (Cal.), 16 Pac. Rep. 546 [1888].
[8] Cadwaller *v.* Nash (Cal)., 14 Pac. Rep. 385.
[9] Clark *v.* Munyan, 22 Pick. 410 [1839].
[10] Lewis *v.* Roper L. Co. (N. C.), 18 S E. Rep. 52.
[11] Clay Co. L. & C. Co. *v.* Montague Co. (Tex.), 28 S. W. Rep. 704.
[12] Hill *v.* Smith (Tex. Civ. App.), 25 S. W. Rep. 1079.
[13] Fry *v.* Stowers (Va.), 22 S. E. Rep. 500.

626. Person Making Declarations must have had Peculiar Means of Knowing Boundaries.*—Declarations as to boundaries made by a grantor, since deceased, while on the land and in possession of it may be introduced. The declarations of any deceased person as to a corner tree or boundary are admissible if it be shown that he had peculiar means of knowledge.[1] What a former owner of an older survey who was one of the original surveyors of a tract, and who helped to locate the corners, and who has since died, has pointed out to witnesses as the corner, is admissible.[2]

Declarations of a deceased surveyor made while he was surveying a different tract of land, the survey of which was not originally made by himself and of which he had no previous knowledge, are not admissible to identify the corners and lines of the survey in dispute.[3] Yet when a deceased surveyor has surveyed another tract of land and in so doing has located the line in dispute and the tract in question, his declarations in regard thereto are admissible whether such other surveys are legal or not.[4] Admission of testimony of a surveyor as to a boundary cannot be held error though in running the line he began his survey outside the land in controversy, the circumstances and facts relative to the lines and adjoining lots not appearing.[5]

Whatever a surveyor knows or learns in regard to the boundary while making a survey he may testify to in a trial to determine the boundary. He may testify that he ran the line, that a certain map was made of the survey, and that the map is correct.[6] He may testify that he found trees of the same species as were designated in the description at about the proper course and distance from the corners, and explain how there might be a slight discrepancy between the bearing and the trees as shown in the original surveys and as he found them on the grant, owing to the variation of the needle.[7]

The surveyor should not be interested.[8] A statutory law which provides that no survey or resurvey thereafter made by any person except the county surveyor shall be considered legal evidence, does not render any surveyor incompetent to testify as to a survey or the correctness of a plat thereof made by him.[9]

627. Opinions of Witnesses Not Admissible.—The opinions, speculations, or conjectures of a witness as to the location of lines and monuments cannot be admitted in evidence to explain a description in a patent or deed. Witnesses can testify only as to the existence of facts and of condition on the

[1] Fry *v.* Stowers (Va.), 22 S. E. Rep. 500.
[2] Beal *v.* Asberry (Tex.), 20 S. W. Rep. 115.
[3] Cable *v.* Jackson (Tex.), 42 S. W. Rep. 136.
[4] Cottingham *v.* Seward (Tex.), 25 S. W. Rep. 797.
[5] Martyn *v.* Curtis (Vt.), 35 Atl. Rep. 333.
[6] Gunn *v.* Harriss (Ga.), 14 S. E. Rep. 593; State *v.* Hoff (Tex.), 29 S. W. Rep. 672.
[7] Angle *v.* Young (Tex.), 25 S. W. Rep. 798; Busse *v.* Covington (Ky.), 38 S. W. Rep. 865.
[8] Cross *v.* Tyrone Min. & Manfg. Co., 121 Pa. St. 390.
[9] Hopper *v.* Hickman (Mo.), 46 S. W. Rep. 973 [1898].

* *See* Sec. 620, *supra*.

ground to explain what is called for in the writing. The lines described must be located according to the description in the instrument.[1] It is wrong to admit testimony as to what a witness *supposed*, or what was generally supposed, to be the boundary-line, though the witness had been long and intimately acquainted with the premises;[2] although, in an effort to establish adverse possession, it is admissible to ask a witness whether it was generally known in the vicinity of the land that defendant's grantor claimed title.[3] The statements of a witness that a ditch was acquiesced in as the dividing-line, and was tacitly consented to by all parties *for the reason* that no one ever obstructed or put a fence in the ditch, are not admissible, being the witness's conclusion.[4]

Where a surveyor, appointed, in an action of trespass to try title, to survey the land and determine the true location of a boundary-line that is in dispute, makes a report in which he attempts to determine questions of fact and to gather up and report evidence, it is proper to quash his report.[5]

628. Surveyor's Opinion as Evidence when Based upon Knowledge of Facts.—Abstract opinion is not evidence, but a surveyor, or any other person conversant in the subject may state facts, and his opinion on those facts, to enable the jury to form a correct judgment of the matter in dispute. This is information, on a question of science, which others unacquainted with the subject must necessarily lack. A surveyor who has not seen the tract of land may after hearing the evidence of others be called to prove on his oath the general condition or effect of the case and its probable result.[6] The conclusions of a surveyor (who is properly instructed), derived from his knowledge of lines and corners found on the ground, may always be given. His opinion upon such questions regarding the location of boundaries is admissible, it being a conclusion of fact and not a legal conclusion.[7]

Where in a case a surveyor who was acquainted with the surveys in question was not permitted to give his conclusions as to the location of a neighboring tract because it was somehow supposed he could not be allowed to give his opinion as to its location, and this for the singular reason that it would be a legal conclusion, it was held that the conclusion of a surveyor derived from his knowledge of lines and corners found on the ground was certainly one of fact and not of law. The question regarding the location is always one of fact, hence one about which a surveyor who is properly instructed concerning the facts may always give his opinion.[8]

[1] Tognazzini *v.* Morganti (Cal.), 23 Pac. Rep. 138.
[2] Beecher *v.* Galvin (Mich.), 39 N. W. Rep. 469 [1889].
[3] Woods *v.* Moulevatto C. & T. Co. (Ala.), 3 So. Rep. 475 [1888].
[4] Beecher *v.* Galvin (Mich.), 39 N W. Rep. 469.
[5] Westbrook *v.* Guderian (Tex.), 22 S. W. Rep. 59.
[6] Peak on Evidence 137; Lessee *v.* Caruthers, 3 Yeates 527 [1803].
[7] Jackson *v.* Lambert, 121 Pa. St. 190 [1888]; N. Coal Co. *v.* Clement, 95 Pa. St. 126.
[8] Farr *v.* Swan, 2 Pa. 245; Northumberland Coal Co. *v.* Clement, 95 Pa. 126; Jackson *v.* Lambert, 121 Pa. St. 190 [1888]; Knox *v.* Clark, 123 Mass. 216 [1877].

However, the question as to how a deed should be construed with reference to a proper location of it, or what was the proper location of a particular deed having reference to other deeds in the case, is a question of law, for the court; and it is not competent for a surveyor to give an opinion concerning such a question.[1]

Testimony of the surveyor who located the line has been received to establish an agreement between the parties as to the location of a boundary,[2] and to disprove such an agreement;[3] or to prove that a certain line was pointed out.[4]

Where the field-notes of a survey are inconsistent, the true description of the survey may be shown by the evidence of the surveyor who made it.[5] A surveyor's declarations are not admissible to contradict his official report on which the commonwealth has issued a grant.[6]

629. Person must Not have had an Interest in Making such Declarations.—An owner of land who is not a surveyor may not testify in a suit between other parties as to the meaning of boundary-lines on the map of the land, put there by his direction when the map was made, the surveyor being dead, since such lines are the declarations of an interested party.[7]

Declarations of a deceased owner made to the son while hunting on the land, a long while before the controversy arose, are competent to prove the location of a boundary which was pointed out when the declarations were made.[8] Declarations by a person after he had ceased to be an owner are not admissible unless they are declarations of a deceased person as to the location of ancient boundaries made on the ground before the controversy arose, and unless such person is shown to have had knowledge but no interest in the case.[9] A declaration of a grantor as to boundaries is not admissible in favor of his grantee and as against persons not claiming under the grantor.[10]

The declarations of a testator explaining the terms of his will setting forth the boundaries, where both parties claim title under such will, are admissible.[11]

630. Starting-point in Making a Survey.—When two deeds describe land as starting from points directly opposite, the distances between the calls, the monuments, and lengths of the lines run being exactly the same, the presumption will be conclusive that both surveys are of the same line, and that it is the true boundary-line.[12]

[1] Kelso *v.* Steiger (Md.), 24 Atl. Rep. 18.
[2] Scott *v.* Means & R. I. Co. (Ky.), 19 S. W. Rep. 189.
[3] Archer *v.* Helm (Miss.), 12 So. Rep. 702.
[4] Scott *v.* Means & R. I. Co., *supra*.
[5] Schley *v.* Blum (Tex. Civ. App.), 22 S. W. Rep. 264.
[6] Reusens *v.* Lawson (Va.), 21 S. E. Rep. 347.
[7] State *v.* Croker (S. C.), 27 S. E. Rep. 49.
[8] Robbins *v.* Dewhurst (C. C. A.), 68 Fed. Rep. 336.
[9] Martyn *v.* Curtis (Vt.), 35 Atl. Rep. 333; Wood *v.* Willard, 37 Vt. 377.
[10] Taylor *v.* McConigle (Cal.), 52 Pac. Rep. 159.
[11] Franklin *v.* Woolridge (Ky.), 45 S. W. Rep. 98 [1898].
[12] Wise *v.* Burton (Cal.), 14 Pac. Rep. 678, 683 [1887].

In determining the boundaries of a survey, the beginning corner as given in the field-notes is of no more dignity or importance than any other corner found upon the ground.[1] The initial point and base-line of a survey may not necessarily be more controlling or even so much so as other points in the survey which are ascertained.[2] Evidence that in making the survey on the ground the surveyor started at the northeast corner is not contradictory of the field-notes, which in describing it commence at another corner.[3]

An ordinance declaring that certain stakes are the initial points of a survey already made, and which attempts to locate lines therein, is void.[4]

631. Evidence to Establish Starting-point of Survey.—Frequently the starting-point of the survey is not described sufficiently to be conclusive as to what is the exact location, and in such a case the determination of the point of beginning may depend upon the evidence of old residents or of surveyors who have made the earlier surveys.[5]

Where several old residents had testified to having seen a certain pine-tree with an "X" marked upon it, and to having heard such tree spoken of as a corner of a certain tract of land and as a corner from which surveys were commonly run, and had testified that such trees were rare in the vicinity, and one surveyor testified to having run surveys from the same tree, it was held that the evidence showed that such tree was a well-known and easily ascertained point at a time long since passed.[6]

When, however, such a tree was pointed out by an aged resident as a corner of a certain survey, and a survey run out from that tree as a starting-point failed to locate the corners as described in the description, it was held that the evidence was insufficient to locate the beginning-point and was therefore insufficient to locate the line.[7]

If, by commencing at the point specified and running either as claimed by plaintiff or by defendant, some of the distances, where no monuments were specified in the description, must be disregarded in order to return to the point started from, a latent ambiguity arises to solve which oral testimony will be admissible.[8]

Where a witness—a civil engineer—testified to the location of the southeast corner of a block (the facts being disputed as to the place where that corner was originally established) as established by him, by measuring from original stakes still in existence, and that he measured from such stakes on the west

[1] Cox *v.* Finks (Tex.), 41 S. W. Rep. 95; Miles *v.* Sherwood (Tex.), 19 S. W. Rep. 853.

[2] Orena *v.* Santa Barbara (Cal.), 28 Pac. Rep. 268.

[3] Lumpkin *v.* Draper (Tex.), 18 S. W. Rep. 1058.

[4] Orena *v.* Santa Barbara (Cal.), 28 Pac. Rep. 268.

As to the best manner of locating an original government corner which has been tampered with or removed, *see* Woods *v.* West (Neb.), 56 N. W. Rep. 30.

[5] Hartsell *v.* Coleman (N. C.), 21 S. E. Rep. 392.

[6] Riseden *v.* Harrison (Tenn.), 42 S. W. Rep. 884.

[7] Holmes *v.* Sapphire Val. Co. (N. C.), 28 S. E. Rep. 545; Graves *v.* Texas, etc., R. Co. (Tex.), 31 S. W. Rep. 87.

[8] Rugg *v.* Ward (Vt.), 23 Atl. Rep. 726.

and south exterior boundaries of the block, and by that means established the southeast corner, and from the point so established made his final measurements as testified to on the trial, this was held to be a proper method of establishing such lost corner.[1]

In Wisconsin the unvarying rule to be followed in establishing a lost corner is to start at the nearest known point on one side of the lost corner, on the line on which it was originally established; then to measure to the nearest known corner on the other side, on the same line; then, if the length of the line is in excess of that called for by the original survey, to divide it between the tracts connecting such two known points, in proportion to the lengths of the boundaries of such tracts on such line as given in such survey.[2] However, in locating a northwest corner of a section of which the northeast corner can be located, it was held wrong to start from a subsection corner in an adjoining township subdivided under a different survey and requiring the surveyor to run a mile and a half to connect the subdivision surveys of the two townships. He should instead merely have followed the calls of the division survey of the township in which the section is located.[3]

When a description designates the beginning corner as a wild China-tree and none of the other corners or lines has been marked upon the ground, it is error for the court to instruct that the beginning corner is of no higher dignity or importance than any other corner of the survey, since the true location of the beginning corner is controlling.[4] On the other hand, when the surveyor abandons a call in the deed for the beginning corner which is to him clearly wrong, and adopts a new call by which a substantial compliance is made with the other calls in the deed, the land conveyed by the field-notes of the surveyor with such changes will hold, especially when the question is not raised for many years thereafter.[5]

In locating the inner corner (center) of quarter-sections it has been held that it should be placed at a point midway between two section-lines rather than at a point 1320 feet from one of the corners.[6] Another case holds that the interior quarter-section corners should be located by intersection, i.e., by running lines from the quarter corner on the east to the quarter corner on the west, and from the quarter corner on the north to the quarter corner on the south.[7]

632. Survey made by Direct or Reverse Calls.—Sometimes it is held that, in order to locate a monument or boundary of land which was run by courses and distances, the footsteps of the surveyor should be followed instead

[1] Lewis *v.* Prien (Wis.), 73 N. W. Rep. 654 [1897].
[2] Lewis *v.* Prien (Wis.), 73 N. W. Rep. 654 [1897].
[3] O'Hara *v.* O'Brien (Cal.), 40 Pac. Rep. 423.
[4] Ayers *v.* Beaty (Tex.), 24 S. W. Rep. 366.
[5] Blackburn *v.* Norman (Tex.), 30 S. W. Rep. 718.
[6] Packscher *v.* Fuller (Wash.), 33 Pac. Rep. 875.
[7] Gerke *v.* Lucas (Ia.), 60 N. W. Rep. 538.

of taking a reverse course.[1] However, the calls of the survey may be reversed under a recognized rule that the beginning corner of a survey is of no higher dignity than any other corner, if by so doing it is found that the discrepancy in the area of the survey is lessened, and that the line falls along the line of the alleged conflicting survey.[2]

The fact that the lines of the survey as laid down in the field-notes include more land than the state was authorized to grant for the purpose intended does not furnish any reason for reversing the calls of the survey and altering one of the lines so as to diminish the quantity of land. Especially is this true when such a change would result in extending the titles of other persons who had paid for their land and had held it for many years.[3]

633. Methods of Closing a Survey in Certain Cases of Error.—To make a survey close, when all the other lines and corners disclose no error or inconsistency, the course and distance of the last line should be rejected as erroneous, and effect be given to the more certain designation, "thence to the place of beginning."[4] Where the last call in the boundary of a patent is "north 20 poles, to the beginning," the line must be run to the beginning though the course is N. 5° 10″ E., and the distance is 141 poles, as the call to the beginning must prevail regardless of course and distance.[5]* The courses in a deed must yield to distances when such was the evident intention of the parties.[6]

Where land conveyed forms a triangle, and two sides and the acreage are given, a straight line from point to point will be adopted as the third side, when the boundary thus formed will inclose the number of acres called for.[7]

So, also, when a deed describes land as containing a certain amount and gives its north, south, and west boundaries; an eastern boundary added thereto, which is shown to be erroneous, may be rejected.[8] If the east and west lines of a part of a lot correspond with each other within a fraction of a foot and with the known and fixed boundaries called for by all prior deeds, the identity of the premises is not affected by the fact that the north and south lines are inconsistent and one must, and both may, be wrong.[9]

If there be an obvious mistake in the description and the intention of the parties can be determined from such description, the court will interpret the

[1] Blackburn *v.* Nelson (Cal.), 34 Pac. Rep. 775; Duncan *v.* Hall (N. C.), 23 S. E. Rep. 362.

[2] Miles *v.* Sherwood (Tex.), 19 S. W. Rep. 853; Swenson *v.* Willsford (Tex.), 19 S. W. Rep. 613.

[3] White *v.* Bum (C. C. A.), 79 Fed. Rep. 271.

[4] Owings *v.* Freeman (Minn.), 51 N. W. Rep. 476 [1892]; Fullam *v.* Foster (Vt.), 59 Atl. Rep. 484.

[5] Simpkins' Adm'r *v.* Wells (Ky.), 42 S. W. Rep. 348 [1897].

[6] Scott *v* Weisburg (Tex. Civ. App.), 21 S. W. Rep. 769.

[7] Hostetter *v.* Los Angeles Ry. Co. (Cal.), 41 Pac. Rep. 330; Wells *v.* Heddenberg (Tex.), 30 S. W. Rep. 702.

[8] Scates *v.* Henderson (S. C.), 22 S. E. Rep. 724; Ray *v.* Pease (Ga.), 22 S. E. Rep. 190.

[9] Blumenthal Co. *v.* Broock (Mo. Sup.), 29 S. W. Rep. 836.

* *See* Secs. 547–550, *supra.*

deed so as to give effect to such intention. An impossible or senseless course given in a deed will be disregarded if the other calls of the description are sufficient to identify the land.[1] If certain calls are given and one of them be such that if followed no land whatever would be described, the description will not be insufficient, but the manifest intention of the parties will prevail.[2] However where land was described as "Commencing at a point in the easterly line of said premises, 3⅛ inches southerly from the northerly line, and running thence westerly to a point in the said northerly line distant 19 feet westerly from the easterly line thereof," it was held to be a description of a straight line only, by which possession could not be delivered.[3]

If land be described as to its boundaries on three sides, the misnomer of the street on the fourth side will be immaterial.[4] A mistake which designates the starting-point as the northwest corner of certain streets when the plans and the description show that the southwest corner was intended will not affect the validity of the deed.[5]

When, in order to make two surveys connect as required by one of the calls of the description, it would change the location of three out of four surveys, and would disregard a corner marked by bearing-trees, and would require that the north and south lines of the surveys be increased 10 per cent., it was held that, rather than make such marked changes in other surveys, the call for the surveys to connect should be disregarded.[6]

Under a description as that lot situated on a certain corner of two streets, having a front on one of 108 feet "more or less," and running back on the other street 126 feet "more or less," "constituting the only realty of said estate," it was held that, though intestate (grantor) died seized of a lot 160 by 126 feet, situate on said corner, it did not all pass by the deed.[7]

Where three sides and the number of acres are known and it is disputed whether the fourth side is a straight or a meandering line, the straight line will be adopted when the tract thus inclosed contains the number of acres called for, and when the acreage would be largely increased if the meandering line were adopted.[8]

If all the calls made by the locating surveyor cannot be strictly observed, as few should be disregarded as possible. If the beginning point be established, lines should be run in both directions as far as possible, and the gap closed as seems most consistent with all the calls.[9] Incidental calls, noted in field-notes as such in passing, unless specially designated in such

[1] Brose *v.* Boise City P. Co. (Ia.), 51 Pac. Rep. 753 [1897].
[2] Hoban *v.* Cable (Mich.), 60 N. W. Rep. 466.
[3] Rowland *v.* Miller (Super. N. Y.), 18 N. Y. S. 205; Code Civil Proc. N. Y., § 1511.
[4] Lochte *v.* Austin, 69 Miss. 271.
[5] Heller *v.* Cohen (Sup.), 41 N. Y. Supp. 214.
[6] Texas Town-site Co. *v.* Hunnicutt (Tex.), 31 S. W. Rep. 520.
[7] Bromberg *v.* Yukers (Ala.), 19 So. Rep. 49.
[8] Hostetter *v.* Los Angeles Terminal Ry. Co. (Cal.), 41 Pac. Rep. 330.
[9] Hill *v.* Smith (Tex.), 25 S. W. Rep. 1079.

manner as to show an intention to make them locative, will not ordinarily have precedence over calls for courses and distances.[1]

Where the field-notes returned by a government surveyor show that section and quarter-section corners were established on a straight line between township corners, and their location is fixed by courses and distances, they will be accepted as presumptively correct. and can be overcome only by the most clear and satisfactory evidence.[1]

[1] Hanson *v.* Township of Red Rock in Minnehaha County (S. D.), 57 N. W. Rep. 11.

PART IV.

EASEMENTS. INCORPOREAL RIGHTS.

CHAPTER XXXII.

EASEMENTS IN GENERAL.

641. Easement Defined.—Operations frequently arise in the practice of civil engineers and surveyors concerning certain incorporeal rights and interests acquired by, or belonging to, their clients or employers not treated in the foregoing chapters. By incorporeal rights are understood those rights in things that can neither be seen nor handled, that are creatures of the mind and exist only in contemplation.[1] They are generally rights and interests acquired by one person in and over the land of another, and include rights of way, rights to water, support, air, light, view, and a multitude of similar interests that are appurtenant to and constitute the enjoyment of land. They are called easements. These rights and interests arise and are met with in surveying and in establishing roads, streets, and railways; in the location of bridges, water-works, and sewers; in selecting sites for structures requiring extra lateral support, light, air, and prospect; in fact, in all engineering projects where questions of water rights and privileges may arise, or where ways may be obstructed, and similar injuries to which damages are a consequence.

An easement or servitude has been defined to be a privilege without profit which the owner of one neighboring tenement has of another, or a right to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor, which right compels the servient owner to suffer, or prevents him from doing, on his own land, something which is to the advantage of a dominant owner.[2] Easements are of two kinds, *appurtenant* and *in gross*. The former run with the land and pass by a deed of conveyance, while the latter are personal and will not pass by conveyance of the land. Easements *in gross* belong to the person using them and cannot be assigned to another nor transmitted by descent. Such easements die with the person and have

[1] Blackstone.

[2] 6 Amer. & Eng. Ency. Law 139.

been held to be so exclusively personal that the owner of the right cannot admit another person to share it with him.

An easement created by a deed is never presumed to be personal or *in gross* when it can fairly be construed to be *appurtenant* to some other estate. If the easement naturally enhances the value of other adjoining lands of the grantor, it is a strong circumstance to indicate that it was intended to be appurtenant to the estate and not merely personal.[1] There is another class of servitudes, known as *quasi*-easements, which includes two subclasses of easements: (1) where there has been an easement proper, with a dominant and servient tenement, and the ownership of such tenements has been joined in one person—in which case, when the ownership is again severed by a conveyance of the dominant estate, the easement does not pass by the general word "appurtenances," but there may be particular or general words indicating an express intention to grant the easement; (2) where the owner of a tenement has imposed a servitude upon one portion of it for the benefit of another portion and there has never been a separate ownership of the two estates. This second subclass is again subdivided into *continuous* and *discontinuous* easements. A continuous easement is one in which the enjoyment is or may be continuous without the necessity of any actual interference by man. Such would be a drain or a sewer. A discontinuous easement is one which can be enjoyed only by the interference of man, and among such may be mentioned rights of way or the right to draw water.

Easements are distinguished from a right of profit, as when a person is entitled to remove and appropriate for his own use anything growing on, or attached to or subsisting upon, the land of another. Such a right is a privilege, and it is an easement; but an easement is or may be a privilege without profit, and merely an accessory to rights of property in land. Such a right to take profits from an estate is called a *profit a prendre*.

An easement may have the following essential qualities: (1) there must be two tenements, the dominant and the servient, owned by two or more proprietors; (2) the rights are incorporeal and, strictly considered, they exist only in favor of, and are imposed only upon, corporeal property; (3) strictly an easement confers no rights to any profits arising from a servient estate; (4) it must have a character of permanency and continuity; (5) an easement appurtenant cannot be assigned separately from the dominant estate; (6) an easement in gross is not assignable at all, nor is it inheritable.[2]

642. How Easements are Acquired or Created. — All easements are created by grant, either express or implied. The latter include those acquired by prescription, since the law presumes the existence of a grant at some former time. An easement being an interest in land, if created by a parol contract it is void under the statute of frauds unless there is shown such a performance as to take it out of the statute. The party asserting a claim

[1] 6 Amer. & Eng. Ency. Law 140, 148. [2] 6 Amer. & Eng. Ency. Law 140, 142.

to an easement must prove his right to it clearly. It cannot be established by intendment or presumption.[1] *

643. How an Easement may be Lost or Extinguished.—An easement may be lost or extinguished (1) by release from the owner of the dominant estate; (2) by merger of the estates under one and the same title; (3) by abandonment. The easement, whether acquired by grant or prescription, may be released, extinguished, renounced, or modified by a parol license granted by the owner of the dominant estate, and executed by the owner of the servient estate.[2] No deed of writing is required to show the abandonment and extinguishment of an easement in the land of another. The act or acts relied on to effect such a result must be of a decisive character. A mere declaration of an intention to abandon will not be sufficient, and the question whether the act amounts to an agreement or not depends upon the intention with which it was done, and that is a question for the jury.[3]

644. Character of Easement Not an Interest in the Fee.—A fee simple in land cannot be acquired by prescription by overflowing the land and using the water therefrom; the most that can be thus acquired is an easement.[4] However, when a water-works company had occupied land, in connection with its franchise, for eighty years, its possession was held to have ripened into a perfect title as against a village which injured the water-works. It was no defense to an action for trespass that said company did not pay for said land as required by its charter.[5]

When an owner has constructed an addition to his buildings, using the exterior wall thereof as the outside wall of the partition, and conveys that part of the lot on which the addition stands, describing it as the "south 26 feet more or less" of the lot with the undivided one-half of the wall, the grantee will take only an easement in the wall and not any part of the land on which it stands.[6] The easement in a street appurtenant to lots is not confined to the steps immediately in front of such lots.[7]

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. It is not the thing corporate itself, which may consist of lands, houses, etc., but something collateral thereto, as a rent issuing out of those lands or houses.[8]

645. Easements Extinguished by Merger of Estates.—An easement of way created in deeds from the owner of two adjoining lots to different persons,

[1] Polson *v.* Ingram, 22 S. C. 541.
[2] Morse *v.* Copeland (Mass.), 2 Gray 302. *And see* Dyer *v.* Sanford (Mass.), 9 Met. 395.
[3] 6 Amer. & Eng. Ency. Law 146, 147.
[4] Terre Haute & I. R. Co. *v.* Zehner (Ind. App.), 42 N. E. Rep. 756; Costello *v.* Harris (Pa. Sup.), 29 Atl. Rep. 874.
[5] Boyer *v.* Village of Little Falls (Sup.), 27 N. Y. Supp. 1114.
[6] Duncan *v.* Rodecker (Wis.), 62 N. W. Rep. 533.
[7] Wilson *v.* N. Y. El. R. Co. (Super.), 30 N. Y. Supp. 547.
[8] United States *v.* Andres Castillero, 2 Bl. 20, 21.

* *See* Secs. 671–690, *infra*.

in favor of one of them over the other, is extinguished by the subsequent acquirement of the title and possession of both lots by one person. A right of way does not revive and pass by the word "appurtenances" where a person purchases land formerly a dominant tenement, but having its easement extinguished by the union of the dominant and servient tenements in the grantor.[1]

When a mortgagor of a dominant tenement becomes owner in fee of the servient estate, the unity of the two estates does not extinguish the easement so as to affect the rights of one claiming an interest in the easement under a foreclosure of a mortgage on the dominant tenement and in which the easement was expressly included.[2] The joining of two estates in the same person, as a mortgagee, will not extinguish a right of way appurtenant to one of the estates until both mortgages are foreclosed.[3] If the title to the land be defective and the title to an easement in it be valid, the easement is not extinguished by unity of possession.[4]

646. Parties Entitled to Enjoy Easement.—Where an easement in a private road is granted to the abutting landowner, his heirs or assigns, it means for the benefit of all his heirs or assigns however numerous and into however many parcels the abutting land may be subdivided or assigned.[5] In Utah and other communities where families are large it would seem that the words "heirs or assigns" might be the means of creating a very large burden upon an estate.

647. Rights and Liabilities of the Parties to the Easement—Maintenance of Easement.—The owner of the dominant estate has a right, as well as a duty, as a part of the servitude, to perform at his own expense all such works as are necessary to preserve and make use of a servitude, and he is therefore entitled to have access to such servient estate to make the necessary repairs. The owner of the servient estate can do nothing to diminish the use, convenience, or benefit of an easement; nor can the owner of the dominant estate enlarge his use so as to increase the burden upon the servient estate, except in so far as such change and use may be necessary to make the easement effectual. Both parties have the right to insist that the easement shall remain substantially as it was at the time of its creation. When a person had an easement in another's land which permitted him to discharge water into a stream by means of a ditch, it was held that if the ditch got out of repair by reason of floods or washing away of its banks or otherwise, it was the legal right of the plaintiff to repair it so as to restore it to its original condition and make it subserve the purpose for which it was originally intended, that of carrying off the water. It was held that he was entitled to have the

[1] Fritz *v.* Tompkins (Sup.), 41 N. Y. Supp. 985.
[2] Duval *v.* Becker (Md.), 32 Atl. Rep. 308.
[3] Ritger *v.* Parker, 8 Cush. 145.
[4] Tyler *v.* Hammond (Mass.), 11 Pick. 193.
[5] Sachs *v.* Cordes, 11 Ohio Cir. Ct. Rep. 145.

ditch kept up as it was when he purchased his land, and to keep it in that condition, and if necessary to enter upon the defendant's land to make repairs, doing no unnecessary damage. He would have no right to substantially change the condition of a ditch to the injury of the defendant's land. He would have no right to change its character by the construction of barriers or embankments and cause greater quantities of water to flow upon the defendant's land in times of freshets or floods. The owner of the servient estate in such a case would have a legal right to reduce such embankments and barriers to the proper standard and size, but would not be justified in destroying the structure.[1]

648. Destruction and Restoration of Easement.—In the absence of any express agreement between the parties, the one whose premises are burdened by an easement is bound to offer reasonable facilities for its enjoyment.[2] Therefore when an easement was created by reservation in a deed, and consisted of a right to take water from a well, there was imposed upon the owners of the servient estate the obligation to keep the well in repair or in a condition to be used. If the owner of the well erected buildings of a permanent character over and upon it and thus destroyed the easement, he is liable for damages for such willful destruction of the easement. If an old right of way be closed and a new one opened up for the use of those having rights in the use of the old one, and if they assent to the change and use the new way for a period less than the statutory period of limitations, the owner cannot close such new way without first restoring the old one to its former condition. If, without restoring the old way, the owner of the land removes the bridge over a stream crossed by the new way, those having a prescriptive right to the old way may rebuild the bridge or fill in the stream where such bridge stood, doing as little damage as possible to the owner of the land, and continuing the use of the way until the old one is restored.[3]

Any one in possession of the dominant estate may have an action for the unlawful obstruction or disturbance of an easement; and if there be permanent injury to the inheritance, one entitled to the reversion may also have an action. The person injured may seek relief in a court of law or a court of equity. At law the remedy is in damages for the injury already done, and in equity the remedy may be for the injuries done and an injunction to restrain further injury.

The destruction of the buildings of a servient estate through no fault of the owner does not extinguish the easement where the enjoyment thereof is not dependent entirely on such buildings. On the rebuilding of a mill, by means of which an easement was enjoyed, the easement itself is revived even though there was no obligation on the servient owner to rebuild.[4]

[1] 6 Amer. & Eng. Ency. Law, *and many cases.*

[2] Bakeman *v.* Talbot, 31 N. Y. 366.

[3] Hamilton *v.* White, 5 N. Y. 9. *And see* Kraut's Appeal, 71 Pa. St. 64.

[4] Hottell *v.* Farmers' Protective Ass'n (Colo.), 53 Pac. Rep. 327 [1898].

If an adjoining owner who has an easement in a right of way has notice that a building is being erected over his right of way by a person who is chargeable with notice of his rights, he is not estopped from an action to remove it. A court will require the removal of such an obstruction, or that adequate compensation be made giving damages.[1]

649. Abandonment of Easements.—The abandonment of an easement may be presumed from various acts of the dominant owner, as, for example, where the holder of a right does or permits to be done any act inconsistent with the future enjoyment of the right. Abandonment may be presumed from non-user for a length of time sufficient to create the right by prescription where such right was originally acquired by prescription. Extinguishment of a right to an easement means its total annihilation, and not its suspension. If extinguished for a moment, it is gone forever. Servitude may be extinguished by the act of God, by the operation of the law, or by an act of the party. It may be extinguished by a renunciation of the party, either express or implied, as by permitting the party from whom the servitude is due to build upon the property such works as would presuppose an abandonment of the right. An act incompatible with the nature or exercise of a servitude is sufficient to extinguish it. The creation of a new inconsistent right by the party himself will extinguish his former right.[2]

If one who owns an easement in a wall which forms a side of his building erect a new building on a different foundation after the destruction of the old wall and building, he thereby loses his easement.[3] So where a deed conveys the right to use a stairway in a building which is necessary to reach the upper floor of the dominant building, the easement continues only so long as the building of which the stairway is a part exists, and it ceases with the destruction of the building.[4]

Growing a grape-arbor in an alley and allowing a tree to grow therein does not abandon the alley or justify other abutting owners in closing it, the obstructions not being serious and the other lot-owners not having requested that they be removed.[5] An abandonment of a right of way by consenting to its obstruction does not constitute a surrender of the right to maintain a sewer-pipe under the way, provided such pipe has not been obstructed or discontinued.[6]

Land covered by a party-wall remains severally the property of the owner of each half, but the title of each is qualified by the easement to which the other is entitled. The only proper easement in such a case is the easement

[1] Welsh *v.* Taylor (N. Y.), 50 Hun 137 [1888].
[2] Taylor *v.* Hampton (S. C.), 4 McCord 61.
[3] Duncan *v.* Rodecker (Wis.), 62 N. W. Rep. 533.
[4] Douglass *v.* Coonley (Sup.), 32 N. Y. Supp. 444.
[5] Ermentraut *v.* Stitzel (Pa.), 33 Atl. Rep. 103.
[6] Stein *v.* Dahm (Ala.), 11 So. Rep. 597.

of support, and it does not include a right to an unobstructed use of a flue by one party which is upon the land of another party.[1]

Where a private lane between two lots was abandoned by the owners, and a line-fence was built in the center thereof, a subsequent purchaser of one of the lots cannot revive the easement in such lane.[2] Acceptance of a deed making no mention of an alley, but including land on which it is located, is not an abandonment of it by the acceptor, he having actual as well as constructive notice and knowledge of its existence and location.[3]

Where an abandonment of an easement is relied on, it is for the one claiming such abandonment clearly to prove it.[4]

650. Easements Lost by Non-user.—For an easement to become extinguished by non-user it must have been acquired by user. The doctrine of extinguishment by non-user does not apply to the servitudes or easements created by a deed. An easement acquired by actual grant is not lost by non-user.[5] In the former cases mere disuse is sufficient; but in the latter there must not only be a disuse by the dominant owner, but there must be an actual adverse user by the owner of the land servient.[6]

A permanent obstruction by one party, insisted on by the other, operates to extinguish all right to a use of a common way wherever such obstruction has existed for a period less than the full statutory period. Non-user for twenty years should be accompanied by acts which show an intention to abandon in order that the easement should be extinguished. Otherwise it requires adverse possession as well as non-user to effect the extinguishment. It seems well settled in many of the older states that the owner of a right of way or other easement may, without deed, abandon his right so as to relieve the servient estate of the incumbrance.[7]

Mere non-user is not sufficient to extinguish a right of way unless there has been an actual abandonment of it, or there have been acts, by those in possession of the land over which it exists, not merely inconsistent with the user of the way, but hostile to the right, and constituting some element of adverse possession.[8]

Abandonment is simply non-user of an easement. The enjoyment of the right must have totally ceased for the same length of time as was necessary to create the original presumption of a grant. Non-user for the full period affords a presumption either that the former presumptive right was extinguished in favor of some other adverse right, or, if no such adverse right

[1] Ingals *v.* Plamondon, 75 Ill. 218 [1874].
[2] Hennessy *v.* Murdock (Sup.), 17 N. Y. Supp. 276.
[3] Ermentrout *v.* Stitzel (Pa.), 33 Atl. Rep. 103.
[4] Hennessy *v.* Murdock (N. Y. App.), 33 N. E. Rep. 330.
[5] Butterfield *v.* Reed (Mass.), 35 N. E. Rep. 1128; Many *v.* Port Reading R. Co. (N. J. Ch.), 33 Atl. Rep. 802; Fird *v.* Harris (Ga.), 2 S. E. Rep. 144.
[6] 6 Amer. & Eng. Ency. Law 148, *cases cited.*
[7] 6 Amer. & Eng. Ency. Law 146–149.
[8] Marshall *v.* Wenninger (Sup.), 46 N. Y. Supp. 670; Lathrop *v.* Elsner (Mich.), 53 N. W. Rep. 791.

appears, that it has been surrendered or never had any existence. Non-user of land, it seems, is sufficient to produce this effect without showing the erection of, or permission to erect, a permanent obstruction.

When a public way is closed up and held by open and notorious possession for more than twenty years, the abutting property owners lose their private rights in it.[1] But a mere non-user of a street or alley of a town for the period necessary to give title by adverse possession will not amount to an abandonment obstructing the rights of the public.[2]

A mere non-user of a right of way granted to a railroad company will not extinguish the right in the absence of adverse possession by the servient owner, or of some acts which show a clear intention to abandon the right of way.[3] Evidence that a railroad was taken up, the rails and ties removed, the fences taken away, and the bridge across an intersecting river torn down, and all with a view of abandonment, is sufficient to show an abandonment of the easement of the right of way.[4]

An easement of a right of way when once acquired is not extinguished by an omission to use it.[5] A mere non-user without an attempt to abandon will not operate as an abandonment of an easement.[6] The non-user must be attended by an act indicating an attempt to abandon the right of way, to give it the effect of a release.[7]

If an abutting owner conveys all his interest in the street and consents to the closing of the street, his grantee cannot thereafter prevent the streets being closed.[8] If a person have a right of way over a neighbor's lot, and if he consent to an enlargement or extension of a building on said lot so as to close the way, he will have surrendered his easement.[9]

651. Extent and Mode of Use of an Easement.—The use of an easement is limited strictly to the purpose for which it was created, but its use may be enjoyed in such a manner as will secure all the advantages contemplated by the grant. It has been held that a dominant estate may be divided, and the privileges belonging to the whole will attach to each of the parts. However, the burden upon the servient estate must not be increased thereby. A dominant owner cannot extend privileges which he has in favor of one estate to others that he may acquire.[10] The owner of an easement in the land of another is not bound to use it in the particular manner prescribed by the instrument which creates it. He may use it in a different manner if he so

[1] Woodruff *v.* Paddock (N. Y. App.), 29 N. E. Rep. 1021; Bentley *v.* Root (R. I.), 32 Atl. Rep. 918.

[2] Crocker *v.* Collins (S. C.), 15 S. E. Rep. 951; Edgerton *v.* McMullen (Kan.), 39 Pac. Rep. 1021.

[3] Roanoke I. Co. *v.* Kansas City, etc., R. Co. (Mo. Sup.), 17 S. W. Rep. 1000 *And see* Kirman *v.* Hunnewill (Cal.), 29 Pac. Rep. 124.

[4] Jones *v.* Van Bochove (Mich.), 61 N. W. Rep. 342.

[5] Welsh *v.* Taylor (N. Y.), 50 Hun 137 [1888].

[6] Valentine *v.* Schreiber (Sup.), 38 N. Y. Supp. 417.

[7] Suydam *v.* Dunton (Sup.), 32 N. Y. Supp. 333.

[8] Comstock *v.* Sharp (Mich.), 64 N. W. Rep. 22.

[9] Stein *v.* Dahm (Ala.), 11 So. Rep. 597.

[10] 6 Amer. & Eng. Ency. Law 152.

desires, provided he does not, in doing so, increase the servitude, nor change it, to the injury of the owner of the servient tenement.[1]

So, too, a deed of all the merchantable coal in an open mine under the grantor's land with a right of way over said land to carry the coal away does not authorize the coal mined upon another tract to be carried over the right of way, nor can it be carried over such way by reason of the practice of a former owner of both tracts.[2] A reservation of a right of way over a farm to a wood lot permits the use of it for hauling stone and other products to the wood lot.[3]*

[1] Tallon *v.* City of Hoboken (N. J.), 37 Atl. Rep. 895.
[2] Vogel *v.* Webber (Pa.), 28 Atl. Rep. 226.
[3] Wells *v.* Tollman (Sup.), 34 N. Y. Supp. 840.

*See Sec. 681, *infra*.

CHAPTER XXXIII.

LICENSE, REVOCABLE AND IRREVOCABLE.

661. License Distinguished from Easement.*—An easement should be distinguished from a license. The former is an incorporeal hereditament and implies an interest in the land upon which it is imposed, and therefore it may be created only by grant, expressed or presumed. A license creates no such interest in the land. A license is authority merely to do some act or acts upon another's land without possessing any estate therein. A license is limited strictly to the original parties and cannot operate for or against third parties. It is founded on personal confidence, is not assignable, and is valid though not in writing. It may be and generally is created by word of mouth, and may ordinarily be revoked at any time by the licensor, *though not always.* Some courts have held that a parol license when executed may become an easement, but it is submitted that this is a misnomer, and that a better name would be "an irrevocable license" based upon the doctrine of estoppel.

A proper understanding of the character of a license is very essential to those persons undertaking construction. Works should not be erected and improvements made upon land by permission of the owner thereof without acquiring a right to control or operate such works, in the form of a lease, a grant of an easement, or some interest in the land, that shall be valid and binding on the owner. Works erected under a mere license from the owner of the land may be required to be removed, or their operation and occupation prevented by the landowner. Such an act on the part of the landowner might render all the works and improvements abortive and a total loss to the parties who had undertaken them.

While this is a general proposition of the law, it has not been sustained by the cases in construction work. These cases have uniformly held that when the owner of land has permitted another person to make valuable and permanent improvements upon his land with the expectation and intention of making some use and profit thereby, the owner may not arbitrarily and willfully eject the party without regard to his interests and the profit he might expect to derive from the investment. Parol licenses when executed or acted upon become irrevocable, and after a disclaimer and long user become easements

* *See* Secs. 738, 739, *infra.*

in the land of the grantor. It has been so held of a ditch,[1] of sewer- and drain-pipes,[2] of a pipe-line for water,[3] and of a stairway for entrance to upper stories.[4]

662. License to Divert Waters by Dams.—Ordinarily an oral permission to divert and use water from a stream is a mere license which is revocable and does not vest any estate in the land.[5] If, however, the licensee has expended money and labor in pursuance of the license, the licensor may be estopped from revoking the license to the detriment and injury of the licensee;[6] as where for eight years riparian owners and their grantors had acquiesced in the diversion of a part of a stream, and a person who was not a riparian owner had yearly aided in keeping the channel of the stream open, and had expended money on his farm which would be useless without the water, a court of equity may refuse to enjoin a further diversion of the water at a suit of such riparian owners.[7]

A license to build a dam, and an undertaking on the part of the licensee, with the licensor's knowledge and assistance, to furnish other persons with water from the dam for a certain period, was held to be irrevocable until after the expiration of that period.[8]

Where the owner of a mill privilege gave the owner of lands which were flowed by the waters impounded by his dam an oral license to erect a dam on the land of the licensee, and also to dig a ditch across the land of the licensor to drain water from a part of the licensee's land, and where under this license the dam was erected and a ditch dug, it was held that the licensor could revoke the license to use the ditch even after the expiration of twenty years, but could not revoke the license to build the dam; and it was further held that, the licensor having undertaken to revoke the whole license, the licensee was justified in making a ditch on his own land to draw off the water so thrown upon it although he thereby diverted the water from the licensor's pond.[9]

Where a landowner had granted a license for the erection of certain dams across a river, a judgment against the licensees for damages caused by improperly maintaining such dams, under a complaint charging them with wrongfully erecting and maintaining the same, was held erroneous as violating the rights of the defendants under the license.[10]

[1] Steinke *v.* Bently (Ind.), 34 N. E. Rep. 97.

[2] Atkins *v.* Thompson (Mass.), 29 N. E. Rep. 627; Stevens *v.* Muskegon (Mich.), 69 N. W. Rep. 227.

[3] National W. W. Co. *v.* Kansas City (C. C.), 65 Fed. Rep. 691.

[4] Joseph *v.* Wild (Ind. Sup.), 45 N. E. Rep. 467.

[5] Jensen *v.* Hunter (Cal.), 41 Pac. Rep. 14. *But see* Churchill *v.* Bauman (Cal.), 30 Pac. Rep. 770, which held that the licensor must withdraw his consent before bringing action; see also as to pleadings. *Accord*, Peay *v.* Salt Lake (Utah), 40 Pac. Rep. 206.

[6] McBroom *v.* Thompson (Oreg.), 37 Pac. Rep. 57; Smith *v.* Green (Cal.), 41 Pac. Rep. 1022.

[7] McBroom *v.* Thompson, *supra*.

[8] Risiem *v.* Brown (Tex.), 10 S. W. Rep. 661.

[9] Morse *v.* Copeland, 2 Gray (Mass.) 302. *And see* Totel *v.* Bonnefoy, 23 Ill. App. 55.

[10] Peay *v.* Salt Lake City (Utah), 40 Pac. Rep. 206.

A simple agreement that one shall have the use of land held and used as his own so long as he keeps a mill running is a mere license;[1] so is a simple right to pass over land.[2]

Many cases have arisen where mill privileges have been granted by parol, and where attempts have been made to revoke such license after the mill and dam have been erected at large expense and other improvements have been made. It has been held in some cases that such a license is revocable, and in others the contrary. An oral promise that if a person would erect a good custom mill at a certain point he should have the privilege of flowing the land so long as he would maintain the mill was held a revocable license after having been acted upon.[3]

Parol agreement to allow a party to drain his land through a ditch over the land of another creates a license merely which may be revoked, as by damming the ditch.[4]

663. Licenses held Not Revocable on Ground of Contract and Estoppel. —The more modern cases rather tend to the contrary rule where licensee has made expensive improvements of a permanent character, so that a revocation of a license would work great injury and would partake of the character of an onerous or even fraudulent transaction; and equity has frequently enforced the license against the landowner, and has in many cases restrained the revocation at least until condemnation proceedings could be had.[5] These cases are placed upon the principles of estoppel, because the parties cannot be placed *in statu quo*.[6]

A valuable consideration may affect the revocability of a license. In the cases cited those which have been held irrevocable are those which have been granted for some consideration either of benefit to the licensor or some detriment to the licensee, as in the case where the latter has made improvements and invested money and could not therefore be put *in statu quo*. The least that can be said is that there was a contract for the breach of which the licensor would be liable in damages; and an undertaking on his part that the licensee should be permitted to enjoy certain rights and privileges for a certain valuable consideration would constitute a complete contract, which, though being within the statute of frauds,[7] would at least give to the licensee an equitable right to the enjoyment of the privilege, or a right to an action for damages for the breach of the contract.

Encouragement alone by an upper landowner to those owning land below

[1] Malcott *v.* Price, 109 Ind. 22.
[2] Parish *v.* Kaspere, 109 Ind. 585.
[3] Johnson *v.* Skillman, 29 Minn. 95; Clute *v.* Carr, 20 Wis. 531. *Contra*, Lee *v.* McLeod, 12 Nev. 280, *and also* Rerick *v.* Kern (Pa.), 14 S. & R. 267; Nunamaker *v.* Columbia W.-p. Co. (S. C.), 25 S. E. Rep. 751.
[4] Dunham *v.* Joyce (Mo.), 31 S. W. Rep. 337. *See also* Cronkhite *v.* Cronkhite, 94 N. Y. 323 [1884].
[5] 19 Amer. & Eng. Ency. Law 859; 13 Amer. & Eng. Ency. Law 551.
[6] Huff *v.* McAuley, 53 Pa. St. 206; Baltimore, etc., Co. *v.* Algire, 63 Md. 319.
[7] Mumford *v.* Whitney, 13 Wend. 380 [1836].

him on the stream to build a mill, which would be of great public convenience, will not operate as a license to permit the flowage of the upper riparian owner's lands by water backed upon it by the dam of the mill.[1]

664. License to Build Water-works and Sewers.—Where a town was authorized by statute to construct water-works *or* to contract with a water company for its supply, and it had adopted the latter course and granted to a corporation the right to construct water-works and to supply the town on certain conditions, and where, after the water company had constructed adequate water-works and was prepared to comply with its contract, the town passed a resolution to construct its own water-works, it was held that, as such action was taken under authority of the same statute, it was in effect an act of the town itself and one which impaired the obligation of the previous contract with the water company, and that it was contrary to the constitution of the United States.[2] In such a case, the town having exercised its option, and having contracted with a company for a water-supply has no power to build water-works of its own, and hence could not enact a valid ordinance for a contract with a new company to supply it and the citizens with water, since it was an indirect exercise of the power to build water-works of its own.[3]

It seems, however, that a part of the town or city might be supplied by water-works owned by the city, and the remainder by a private water company.[4]

Where a city council, by contract in writing, grants to an individual the right to lay a sewer (for which there is great need) in certain streets, and to connect the same with the premises of such adjoining lot-owners as may contract with him therefor, the work to be done under the supervision of the city, but at the expense and for the profit of the grantee, the latter acquires a vested right which cannot be revoked by the city. But after the sewer is constructed the grantee may not recover damages because the city passes an ordinance prohibiting persons from connecting with any private sewers laid in the streets without first obtaining permission from the council. If the grantee be arrested for subsequent violation of this ordinance, an action at law for damages will not lie, because the ordinance is an exercise of the city's governmental powers. The grantee may proceed to restrain any interference with his vested rights.[5]

A city or village having no sewer system of its own may grant to a citizen, under proper circumstances and restrictions, the right to construct a private

[1] Himes *v.* Jarrett, 26 S. C. 480.

[2] Westerly Water-works *v.* Town of Westerly (R. I. C. C.). 75 Fed. Rep. 131. *And see* White *v.* Meadville (Pa.), 35 Atl. Rep. 695; Carlisle Gas & W. Co. *v.* Carlisle W. Co., 182 Pa. St. 17; Welsh *v.* Beaver Falls (Pa.), 40 Atl. Rep. 784 [1898].

[3] Welsh *v.* Borough of Beaver Falls (Pa.), 40 Atl. Rep. 784 [1898].

[4] Donahue *v.* Morgan (Colo.), 50 Pac. Rep. 1038 [1897].

[5] Stevens *v.* Muskegon (Mich.), 69 N. W. Rep. 227.

sewer at his own expense in the street, which may be used by him without interference by others without his consent. The right to the exclusive use of the sewer is not affected by the fact that the sewer is not upon the side of the street specified in the resolution, where there is obviously a clerical error in the resolution in that respect.[1]

Where works that have been erected and operated for a long time under a franchise and agreement by which a city is to take light, heat, or power for a period of years, no right to rescind for non-performance being reserved, and where the works are destroyed without fault of the owner, the city must exercise any right it may have to rescind the contract within a reasonable time, and must not wait until a rescission will work a great injury to the owner of the plant. If the city delay in giving notice of such rescission until the works are practically rebuilt, such rebuilding not having been unreasonably delayed, it may be held to have waived its rights to terminate the contract or to repeal the ordinance granting the franchise.[2]

665. License to Build and Operate Railroad.—Where an owner of land allows a railroad company to occupy and use it for the construction of its road without remonstrance or complaint, a grant may be implied and the landowner may be held to have acquiesced therein and to have waived his right to dispossess the company.[3] As Chief Justice Redfield of Vermont has said: "In these great public works, the shortest period of clear acquiescence, so as to fairly lead the company to infer that the party intends to waive his claim for present payment, will be held to preclude the right to assert the claim, or to stop the company in the progress of the work, and especially to stop the running of the road after it has been put in operation whereby the company acquires important interests in its continuance."[4] If the owner of a right of way stands by while a railroad company erects an expensive railway embankment over the way, he cannot abate the obstruction until the railroad company shall have a reasonable opportunity to condemn the right of way.[5]

Where a railroad company enters and constructs tracks on land under a mere license from the owner, it acquires no easement in the land.[6] Such permission to a railroad company to enter and construct its road does not give title to the right of way or estop the owner from maintaining an action for ejectment, but the execution would probably be stayed until the company should have had a reasonable time in which to pay for the right.[7] The owner does not waive his right to damages such as would have been recovered in regular condemnation proceedings unless the delay has been so long that the

[1] Boyden *v.* Walkley (Mich.), 4 Det. L. N. 420, 71 N. W. Rep. 1099.

[2] Mills *v.* Osawatomie (Kan.), 53 Pac. Rep. 470 [1898].

[3] 19 Amer. & Eng. Ency. Law 860; St. Julian *v.* Morgan, etc., R. Co., 35 La. Ann. 924.

[4] McAulay *v.* Western Vt. R. Co., 33 Vt. 311.

[5] Manning *v.* Port Reading R. Co. (N. J. Ch.), 33 Atl. Rep. 802.

[6] Minneapolis W. Ry. Co. *v.* Minneapolis & St. L. Ry. Co. (Minn.), 59 N. W. Rep. 983.

[7] Conger *v.* Burlington, etc., R. Co., 41 Ia. 419.

right is lost by the statute of limitations.[1] A parol license to a railroad company to use a right of way cannot be revoked after the expenditure of money for the completion of the road and after its operation for fourteen years, nor can one claiming under the licensor.[2]

A license to make a roadway is exhausted by the first one built, and the licensee cannot substitute a solid roadway for one originally built by him on piles.[3]

666. Party-walls, Stairways, and Passageways etc.—A license to use the wall of a house as a party-wall in consideration that the licensee would erect a brick house instead of a frame one was held irrevocable after the house had been built.[4] But an agreement that if a man's neighbor would deed two extra feet of ground he would put a stairway wholly in his building, and allow it to be used by the neighbors, tenants of the upper stories, may be abrogated and the use of such stairway refused even though the tenants have used it for several years, in the absence of evidence that money had been expended or improvements made on the strength of the license.[5]

A parol license to float spars on a stream for a valuable consideration cannot be revoked after the grantee has acted upon it.[6] Parol grants of a right of way for a valuable consideration followed by use for sixteen years (the statutory period) may not be revoked.[7] A license granted by a city to erect an awning over the sidewalk may not needlessly be revoked until the licensee has enjoyed it sufficiently for his outlay.[8]

667. License of Purchaser to Enter and Take.—Ordinarily the purchase of materials or structures located upon land carries with it a license to enter and take and carry away such materials and structures in the way and after the manner contemplated by the parties. Such materials are standing timber, sand, clay, stone and other minerals, including gas and oil.

A purchaser of standing timber, who had paid in full therefor and who had two years in which to remove it, was given by the seller a parol extension of two years more, and it was held that such extension could not be revoked by the seller or his grantee with notice.[9]

There is little doubt but that the licensee would have the right to enter upon the land and take such timber as he had already cut without being liable to an action for trespass.[10] Such a license to enter upon the land cannot be countermanded after it has been acted upon.[11] According to the Massa-

[1] 19 Amer. &. Eng. Ency. Law 860, 861 *and cases cited;* G. H. & S. A. R. Co. *v.* Pfuffer, 56 Tex. 66 [1881].

[2] Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490. *See also* Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265.

[3] Trustees *v.* Jessup (Sup.), 42 N. Y. Supp. 4.

[4] Russell *v.* Hubbard, 59 Ill. 335.

[5] Baldwin *v.* Taylor (Pa. Sup.), 31 Atl. Rep. 250. *See* Joseph *v.* Wild (Ind. Sup.), 45 N. E. Rep. 467.

[6] Rhoades *v.* Otis, 33 Ala. 578.

[7] Nowlin *v.* Whippel, 79 Ala. 481.

[8] City Council of Augusta *v.* Burim (Ga.), 19 S. E. Rep. 820.

[9] Williams *v.* Flood, 63 Mich. 487.

[10] Claflin *v.* Carpenter (Mass.), 4 Met. 580.

[11] Claflin *v.* Carpenter, *supra;* Nettleton *v.* Sikes (Mass.), 8 Met. 34; Nelson *v.* Nelson (Mass.), 3 Gray 85; Douglass *v.* Shumway (Mass.), 13 Gray 498.

chusetts cases cited it seems that the owner may revoke the license in regard to timber standing, but that he may not revoke the license with regard to timber which has been cut.[1]

An oral sale of a frame building with a right to remove it was held to create an irrevocable license to enter and remove the building. A grant of an exclusive privilege to take wild fowl on the lakes, sloughs, and waters of the grantor, with the privilege of ingress and egress for the purpose, was held a grant of a *profit a prendre*.[2]

A license to hunt at pleasure on the land of the licensor was held a justification for the entry of the servant and companion of the licensee.[3]

668. License the Subject of Transfer.—It seems that a license may be the subject of a transfer, and that an assignment of a license will be upheld. Thus where a licensee constructed a dock on lands belonging to the state, under license issued by the superintendent of public works, and afterwards assigned the license and transferred his interest in the dock, it was held that he was estopped from denying his right to make such assignment and transfer in an action brought by his vendees to enjoin the unlawful use of the dock.[4] This right seems, however, to be denied where the license partakes of a personal character or preferment. Permission to erect a house and to occupy it without molestation so long as the licensee thought fit or his convenience might require was held a power which could not be transferred to a third person even after the house had been built.[5]

669. Revocation of License.—When structures or works which have been erected by license upon another's land are destroyed by the elements, the licensor may then revoke the license and extinguish the right. This was so held when an aqueduct went to decay and became unserviceable.[6]

If the owner of land appropriates it to uses which are inconsistent with the enjoyment of the license which he has granted, or if he, by other acts, indicates an intention to revoke the license, such acts will effect a revocation.[7] The locking of a gate through which a person has had a license to pass is a revocation of the license. The commencement of an action for damages may constitute a revocation, and a license of a partnership is revoked by the dissolution of the partnership.[8] A mere parol license, not founded upon a valuable consideration, permitting water to flow from a gutter onto an

[1] Giles *v.* Simonds (Mass.), 15 Gray 441; Burton *v.* Scherpf (Mass.), 1 Allen 135.

[2] Brigham *v.* Salene, 15 Oreg. 208.

[3] Muskett *v.* Hill, 5 Bing. N. C. 694; Wickham *v.* Hawker, 7 Mees. & W. 63; Doe *v.* Wood, 2 Barn. & Ald. 724.

[4] Ziegele *v.* Richelieu & O. Nav. Co. (Sup.), 38 N. Y. Supp. 1022.

[5] Jackson *v.* Babcock (N. Y.), 4 Johns. 418. *And see other cases*, 13 Amer. & Eng. Ency. Law 556.

[6] Allen *v.* Fisk, 42 Vt. 462. *And see also* Veghte *v.* Raritan Water-power Co. (N. J.), 4 C. E Greene 142–159; Morse *v.* Copeland (Mass.), 2 Gray 302; Totel *v.* Bonnefoy, 23 Ill. App. 55.

[7] Simpson *v.* Wright, 21 Ill. App. 67.

[8] 13 Amer. & Eng. Ency. Law 557.

adjacent building, is revoked by the conveyance of the adjoining building, without further notice.[1]

When the license granted is of an executory nature and the servient land has been conveyed to another, such conveyance works a revocation of the license; but if the license has already been executed, it does not affect the rights of the parties concerned. Cases of executory licenses of the class named are those where the person has been granted a license to go upon land for the purpose of cutting and taking timber. In case of an oral license for a valuable consideration to cut, within a certain time, the trees standing upon land which is afterwards conveyed by an absolute deed to a third person, the act of conveyance revokes the license to take the timber that is uncut.[2]

[1] Winn *v.* Ulster Co. Sav. Inst. (N. Y.), 37 Hun 349.

[2] Drake *v.* Wells (Mass.), 11 Allen 141; Cook *v.* Stearns, 11 Mass. 533; Jenkins *v.* Sykes, 19 Fla. 148; Coleman *v.* Foster, 1 H. N. 37.

CHAPTER XXXIV.

PRESCRIPTION AND PRESCRIPTIVE RIGHTS.

671. Importance of Easements in Engineering and Architectural Operations.—Every project or undertaking in engineering requires the acquisition and appropriation of property, and the assuming of the burdens incident to property. It comprises the erection and maintenance of a new structure, and therefore a change in existing conditions and circumstances. If an important undertaking, it may change the surroundings, the value and character of property in the vicinity, and the uses and purposes for which it may be employed; it may divert the course of trade and traffic, it may be a blessing to the community, or it may prove an intolerable nuisance. Injuries and resulting damages are a certain consequence of every engineering work, and a successful engineer must know what constitutes actionable injuries, and must, if possible, avoid them. The direct injuries to abutting property and estates are usually apparent to a cautious and observing engineer and may be guarded against; but there are other injuries none the less troublesome and frequently more fatal to the rapid progress and completion of works. They are injuries to incorporeal rights, invisible, unobserved, unrecorded, sometimes ancient and far-distant rights that suddenly issue from obscurity in the shape of an exorbitant and extortionate demand, or of a threatened injunction on account of some unthought-of injury. A knowledge of these rights and the anticipation of their infringement would reasonably be expected of the engineer or architect more than from an attorney who frequently ends his labors with an exhausting search of paper titles in the registry office. The engineer's or architect's experience enables him to anticipate future complication the result of installation and operation of works, and to secure to the project privileges and rights that may be the subject of expensive litigation. He knows the effects that result from the use of fuel, steam, electricity, and the conditions that attend the manufacture or use of gas, oil, chemicals, and other explosive agents.

Many of these rights are incorporeal, and some are not; but even those that are corporeal have many of the incidents belonging to easements, and they may therefore all be considered together. The right of an owner of land to the natural flow and a reasonable or proportional use of water, light, and air

is a natural corporeal right incident to property. If any one prevents their natural flow or destroys their native purity, he is transgressing the rights of every landowner through or against whose land they would pass. These rights are separable from the land and may be conveyed by or reserved from a grant, or acquired by prescription. It is with the latter that we have here to deal. What may be said of ways will in general apply to waterways, whether a stream, a canal, a drain, or a sewer.

672. Easements Acquired by Prescription.—These rights are frequently acquired by prescription, which is closely allied and in many respects similar to the law of limitation. Prescription strictly applies only to incorporeal rights; while adverse possession is confined to corporeal property. Both are generally governed by the same law in this country—the law of limitations. There are few prescription acts in America. The whole doctrine of prescription, like that of adverse possession, is founded upon public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces in this respect to the interests of society, and at the same time is promotive of private justice by putting an end and fixing a limit to contention and strife. Strictly the statute of limitations, which governs adverse possession, does not apply to these incorporeal rights; but it has become universally settled that an uninterrupted use of a way or other easement, under a claim of right for the period fixed by the statute of limitations as a bar to the recovery of lands held adversely, gives the person so using it a full and absolute right to such easement as much as if it were granted to him.[1] If an adverse possession for the statutory period of limitations will give a possessory title to the land itself, it seems to be only reasonable that it should afford a right to a minor interest arising out of the land.[2]

673. Differences between Prescription and Limitations.—There is this difference between the statutes of limitations and the law of prescription. The statutes of limitations declare that if the owner has not had possession during a certain period, he is barred from entering and can have no action against the one in possession; in prescription the claimant must have had the use and enjoyment for the full period in order to have any claims to a continued enjoyment. He is then held to be entitled to the use of the easement as a matter of right, as if holding under a grant which, though implied, will be upheld unless the presumption in its favor be rebutted. In adverse possession the owner is refused the protection of the courts, as having lost his rights; in prescription the one who has acquired the rights may enforce them by the assistance of the courts. In this country it amounts to the same thing, for the owner will succeed as against the trespasser who has not had open, adverse, and continuous possession for the full period, because his paper title is constructive possession.

[1] Tracy *v.* Atherton, 36 Vt. 503. [2] 3 Stark Ev. 1215.

In the ordinary transactions of mankind men are not disposed to allow others to exercise dominion over their property. When, therefore, such dominion has been exercised for a long period without objection on the part of the owner, it is reasonable to conclude that such use began in right or there would have been objection. On this ground the doctrine of prescription rests. It is purely a legal fiction. The doctrine proceeds wholly upon the ground of presuming a right after such length of enjoyment, and not upon the ground that a grant was made, which has been lost. The undisturbed enjoyment for the full period imposes a duty upon the jury to presume a grant, and they will be so instructed by the court. Not that either the court or the jury believe there ever was a grant, but because public policy and convenience require that long-continued possession and enjoyment should not be disturbed.[1]

674. Presumption after Use for Statutory Period Not Easily Rebutted.—An owner cannot overcome this presumption of right arising from an uninterrupted user for the statutory period by proof that in fact no grant was ever made. The case is not varied though it be shown ever so clearly.[2] The presumption is so strong that, if unrebutted, it becomes a presumption of law, and is such conclusive evidence as to warrant the court in holding that it confers a right on the possessor to the full extent of his user.[1] An owner may rebut the presumption by contradicting or explaining the facts upon which it rests; he may show that the right claimed could not have been granted away, or that the owner was incapable of making such a grant. He may explain the user or enjoyment by showing that it was made under permission asked and given, or that it was secret, or that the user was such as to be neither physically capable of prevention nor actionable.[3]

By analogy the courts have made the law of prescription conform in all substantial particulars, and in so far as the differences in the subjects will allow, to the statute of limitations applicable to lands.[4] It may be laid down as a general rule that the use and enjoyment of an easement or incorporeal right affecting the lands of another for the local statutory period is sufficient to establish a good right and title by prescription.[5] The use and enjoyment necessary to acquire an easement by prescription is the same as is required to give the title under the statute of limitations. A prescriptive right once acquired is absolute, and cannot be lost or prejudiced by any acknowledgment on the part of the possessor.[6]

675. The Use should be by Acquiescence and Not by Force.—The use must be open, adverse, under claim of right, exclusive, continuous, and

[1] Tracy *v.* Atherton, 36 Vt. 503.
[2] Lehigh V. Ry. Co. *v.* McFarlan, 43 N. J. Law 605; Tracy *v.* Atherton, 36 Vt. 503.
[3] Lehigh V. Ry. Co. *v.* McFarlan, 43 N. J. Law 605.
[4] Poland, Ch. J., Tracy *v.* Atherton, 36 Vt. 503.
[5] Parker *v.* Foote, 19 Wend. 309.
[6] Weed *v.* Keenan (Vt.), 13 Atl. Rep. 804 [1888]; Hathorn *v.* Kelly, 86 Me. 487.

uninterrupted.[1] To these sometimes are added the further qualifications that it must be by acquiescence and not by force. Acquiescence as here used is understood to mean that there was knowledge and that there has been no interruption. If the owner does not interrupt the enjoyment in any way, he does acquiesce so far as is needful in order to make the possession effectual against him.[2]

What is understood by force requires no explanation, but what degree of contention or warfare will deprive the claimant of his right is an extremely difficult question. Contention being a usual consequence of interruption, it will perhaps be appropriately discussed in connection with that subject.*

When one has proved use by the plaintiff and the general public of a passageway over land for forty years, the burden is on the defendant to show that the use was permissive merely.[3]

676. The Prescriptive Use must be Open and Adverse and Not Interrupted.†—The general interpretation of the words "open, adverse, under claim of right," is practically the same as in adverse possession. The use or enjoyment must not be in secret or by stealth; it must not be by leave, favor, or license, but under claim or assertion of right. It must not be by force, nor be interrupted for the full period of limitation.[4] There must be neither legal incompetence nor physical incapacity; and finally, the enjoyment or use must be such a burden or injury to the servient estate as to be actionable and capable of being prevented by the owner. If these conditions are claimed and proved by the person claiming the easement, his right to the continued enjoyment of the same rights cannot be defeated.

Two things are inseparable incidents, viz., *possession* or *user* and *time*. The user must be long, continuous, and peaceable; *long*, that is, during the time prescribed by law; *continuous*, that is, it must not have been interrupted according to the lawful meaning of the word; *peaceable*, because if it be contentious, and the opposition be on good grounds, the party will be in the same position as at the beginning of his use.[5]

The use must be open and notorious. In a recent case it was held that the fact that a building stood partly upon another's land and overhung it so that the water from the eaves dropped upon it was not patent to the owner, and therefore no easement had been acquired by adverse user.[6] ‡ A prescriptive right to have water drop from one's eaves upon another's land is not destroyed by raising the roof so that the eaves are higher from the ground, in the absence of proof that the burden has been increased.[7] The signs of the servi-

[1] Tracy *v.* Atherton, 36 Vt. 503.
[2] Tracy *v.* Atherton, 36 Vt. 503; Richard *v.* Hupp (Cal.), 37 Pac. Rep. 920.
[3] Burch *v.* Blair (Ky.), 41 S. W. Rep. 547.
[4] Parker *v.* Foote, 19 Wend. 309; Vaughan *v.* Rupple, 69 Mo. App. 583.
[5] Lehigh Valley R. R. Co. *v.* McFarlan, 43 N. J. Law 605.
[6] Reiner *v.* Young (N. Y.), 16 N. E. Rep. 368 [1888].
[7] Harvey *v.* Walters, L. R. 8 C. P. Cas. 162 [1872].

* *See* Secs. 529–531, *supra*.

† *See* Secs. 515–525, *supra*.

‡ *See* Sec. 183, *supra*,

tude, the marks of the burden, should be open and visible.[1]*

677. The Use Must Not be Interrupted.—To constitute interruption, the law requires some obstruction to the use of the easement, some act of interference with its enjoyment, which if unjustified would be an actionable wrong and sufficient cause for the claimant to come into court. Mere denials of right, complaints, remonstrances, prohibitions, and threats will not be considered as interruptions of the user, or indicate that the enjoyment of it was contentious; there must be an actual interruption or obstruction of the enjoyment. If the owner interrupt the enjoyment of the easement and the one claiming it really has any right to it, he should assert it by an action at law; and if he chooses to postpone his action until witnesses are dead and the facts have faded from recollection, he has only himself to blame.

To acquire a right of way over lands by prescription the use must have been adverse for the full statutory period.[2] The use must be continuous for the full statutory period or longer to create an easement of a right of way,[3] or of drainage in a ditch,[4] or of a bridge over a canal.[5]

678. What will Amount to an Interruption.—Mere protests and denials by the owner do not interrupt an adverse user because they give the claimant no right to sue and establish his right. If protests and remonstrances could deprive one of his continuous and adverse enjoyment, he could neither assert his right by an action at law, nor have the advantage accorded him by the aw as consequent to such enjoyment. Protests and remonstrances by the owner against the use of the easement rather add strength to the claim of a prescriptive right, for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, and is hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruption or obstruction of the enjoyment.[6]

What degree of force by the owner and counter-resistance by the claimant must be exercised to make an enjoyment contentious or by force must depend upon the particular circumstances of each case. It seems that there must be a pronounced determination on the part of the owner to interrupt the enjoyment, and that little short of violence will accomplish it. If the owner has not sought the protection of the courts, but has relied upon himself to inter-

[1] Griffiths *v.* Morrison, 106 N. Y. 165; Rogers *v.* Sinsheimer, 50 N. Y. 646.

[2] Prewitt *v.* Graves (Ky.), 35 S. W. Rep. 263; Young *v.* Conrad (Ky.), 38 S. W. Rep. 497; Gatewood *v.* Cooper (Ky.), 38 S. W. Rep. 690.

[3] Chicago *v.* Howes, 169 Ill. 260; Bushey *v.* Sautiff (Sup.), 33 N. Y. Supp. 473.

[4] Wilkins *v.* Nicolai, 74 N. W. Rep. 103.

[5] Tytus Gardner Paper Co. *v.* Middletown Hyd. Co., 15 Ohio Cir. Ct. Rep. 118.

[6] Lehigh V. Ry. Co. *v.* McFarlan, 43 N. J. Law 605. *Accord*, Okeson *v.* Patterson, 29 Pa. St. 22 [1857]; Jordan *v.* Lang, 22 S. C. 159 [1884]; Connor *v.* Sullivan, 40 Conn. 26 [1873]. *Contra*, Chicago & N. W. R. Co. *v.* Hoag, 90 Ill. 339 [1878].

* *See* Sec. 183, *supra.*

rupt the adverse use and has failed, he must show an endeavor to repel and expel the claimant by violence, and if unsuccessful he must show a continued diligence and persistence. There must be force, strife, violence, and if the owner fails by these to effect an interruption, he should appeal to the courts. It cannot be said with certainty that perpetual warfare even will relieve the servient estate from the burden of the easement if no actual interruption has been accomplished. This seems to be the doctrine of the English cases, where peacefulness and acquiescence are used indifferently as equivalent to non-interruption.

679. Instances of Interruption.—A few illustrations will serve to give a better idea of the law as to easements acquired by adverse use and enjoyment. Some in respect to rights of way are the following: A sign notice "No trespassing" will have no effect to interrupt or deprive the claimant of the benefit of his enjoyment. Mere temporary obstructions due to erecting a house, but with no intention of stopping the way, which is subsequently repaired and reopened, will not amount to an interruption. Whether what occurs at the time an interruption is attempted amounts to an interruption depends upon circumstances, upon the conduct of the party when forbidden to enter or when ordered away. If the claimant when ordered away or threatened with expulsion deserts or withdraws, on a well-grounded apprehension that the owner means to enforce obedience to his commands, an action for disturbance will lie. He should therefore bring such action and be put in possession of the enjoyment of his rights. If he does not, it is evident that he has no such right and it amounts to an interruption. If the trespasser turns back when threatened, he may be said to have yielded and to have forfeited his rights acquired by adverse enjoyment up to that time. His adverse use has been relinquished, and he has acknowledged the owner's superior right. The user begins anew and must be adversely and continuously enjoyed for the full period from the interruption, and without subsequent hindrance.

680. Method or Means of Interruption.—The manner of obstruction does not matter; if a house be placed over the way, or a board, or a wire even be placed with an intention to obstruct the way, and it does successfully interrupt the use of it, it is sufficient. For this reason one sometimes meets obstruction in streets of cities where private streets are fenced to prevent the public from acquiring rights over them. This is a common occurrence in Massachusetts. The obstruction need remain but a few days, long enough to amount to an assertion of the owner's dominion over the street, and to give the city, or the public, or the individual good cause for an action at law. With this end in view, it is the practice of large corporations and universities to build fences or to otherwise obstruct certain avenues and streets in order to maintain their control over them. If the encroachment by the public has been casual and without claim of right, the owner may move his fence to the

boundary-line of the highway when the encroachment is brought to his notice.[1]

681. Prescriptive Rights Limited to the Prescriptive Use.—To obtain a prescriptive right, the enjoyment must have been the same as the right which is claimed, and of the same object, throughout the whole period. The adverse user of a way must have been continuously over the same route; it must have been a burden upon the same portion or part of the servient property; the enjoyment must have been for the same purposes and to the same extent; and when acquired the right is still limited to the extent of the enjoyment exercised at the beginning. No greater burdens can be claimed than the continued user has created. Prescriptive rights when acquired are confined to the extent and purposes employed to acquire them. Therefore the acquisition of a right of way from a house on one tract of land over another tract will not entitle the person to move his house upon an adjoining estate and claim his right of way over the servient estate from the new location of his house.[2] He is a trespasser if he attempt to use the right of way from the new site. He can come to the original site of his house, and make a new departure over the servient estate, but the burdens must not be increased.

The same principle applies if he has bought adjoining property for a garden. He may not draw the produce from the garden over the servient estate directly without being a trespasser, but he may bring vegetables to his house, load them into wagons, thus making a new point of departure, which is within his prescriptive right.[3] Hay grown upon an adjoining farm but stacked upon the estate to which a right of way was appurtenant can be carried over the servient estate, since the use was from the dominant estate over the subordinate estate.[4] The use of a right of way to a woodhouse or well cannot be continued and converted into a way to a dwelling-house when the woodhouse is converted into a cottage or dwelling-house.[5] Nor can a way for horses, carts, and carriages be made a right of way for all purposes. The extent of the right is a question for the jury, under all the circumstances of the case.[6] A use acquired for all purposes for which a road was wanted at the time does not establish a right of way for all purposes in an altered condition of the property which would impose a greater burden on the servient estate.

Whether the use is within the rights acquired is a question for a jury, and may therefore vary.[7] Thus where a person has a right of way from one of his lots to another across another man's fields, and, instead of going entirely

[1] The State *v.* Schilb, 47 Ia. 611.
[2] Skull *v.* Glenister, 16 C. B. (N. S.) 81 [1862]; Williams *v.* James, L. R. 2 C. P. 577 [1867].
[3] Hoyt *v.* Kennedy (Mass.), 48 N. E. Rep. 1073 [1898].
[4] Williams *v.* James, L. R. 2 C. P. 577 [1867].
[5] Allan *v.* Gomme, 11 A. & E. 759.
[6] Cowling *v.* Higginson, 4 M. & W. 245.
[7] Skull *v.* Glenister, 16 C. B. (N. S.) 81 [1862]; Koons *v.* McNamee, 6 Pa. Super. Ct. 445.

across the servient estate to his own lot, he takes a public road which his right of way crosses, and goes to town, it has been held that he is not liable to an action of trespass, although the right of way is to the other lot and not to the highway.[1] This establishes the principle that the dominant owner may decrease the burdens of the servient estate though he may not increase them. Where a man purchased an adjoining estate with an appurtenant way over a third party's land and drew building materials over the way to the estate bought, but which were eventually used for a house upon his original land, it was held to be a question for the jury to decide whether the use was a *bona fide* exercise of the right of way or a mere colorable mode of getting to his own estate.[2] Likewise a use for ordinary agricultural purposes does not establish a right of way for carting materials to build a number of new houses. The burdens must not be increased or the nature of the use changed.[3]

In the case of a dam, the easement acquired is not the right of maintaining a dam or structure upon the land of the party himself, but the right to flow back the water on the land of his neighbor. His neighbor has no right of action for the mere building of the dam, unless it throws the water back upon his land; his suffering it is no acquiescence in anything from which a grant or permission can be presumed.

No one is bound to measure the dam of an adjoining proprietor and employ an engineer to calculate whether, if kept tight, it will flood his land. Where it does and he permits it for twenty years, a grant will be presumed, but this only to the extent to which his land was habitually or usually overflowed.[4]

Where a dam is a permanent structure it is not necessary that the water confined by it should be maintained at the highest level, nor that the dam should always be kept in perfect repair. It is the height of the water ordinarily behind the dam, when kept in repair as dams are kept for profitable and economical use, that will fix the height acquired by prescription. If a dam is permitted for one or more years to be out of repair, so as to injure the land above it, that time will not be counted in the prescription; the prescription is interrupted and must commence anew. This rule applies only to such dams as are permanent and to such gates and movable parts as are constantly used and kept in their places to raise the height of the water. Boards or gates that are used only at intervals and in seasons of low water, so as to increase the water in the mill-pond, without overflowing the lands above, cannot gain the right to keep the dam at the height to which they raise it, if that will make the level of the water upon the lands of the upper proprietor higher than has been maintained for the period of twenty years.

[1] Colchester *v.* Roberts, 4 M. & W. 769.
[2] Skull *v.* Glenister, 16 C. B. (N. S.) 81 [1862].
[3] Wimbledon Conservators *v.* Dixon, 1 Ch. D. 362.
[4] Carlisle *v.* Cooper, 19 N. J. Eq. 256 [1868].

When an easement to flow water is claimed by adverse enjoyment, the whole burden of proof is on the claimant.[1]

Where a person has adversely used a wooden drain across another's lot, the laying by him of an earthen drain inside thereof does not interrupt the running of the statute of limitations in favor of his easement therein. The fact that the earthen pipe was laid at the joint expense of the owners of the servient and of the dominant estates does not, as a matter of law, prevent the use of it by the latter from being adverse. The fact that during part of such adverse user he used it for the drainage of additional waters does not affect his prescriptive right to its use for ordinary purposes.[2]

Where a railroad company takes possession of the real estate of another for a right of way without color of title, its rights acquired by prescription are limited to the land actually occupied, as there is no presumption that it appropriated a strip of the usual width, or all that the statute allows it to take for that purpose.[3]

682. Prescriptive Rights against the State or the Public.*—At common law there could be no prescriptive right acquired against the crown, and the same principle applies to adverse possession. Adverse possession cannot be held against the United States, or against a state, unless the statute expressly includes the state in its operations. States having such statutes are Alabama, Arizona, Dakota, Kansas, Maryland, Nevada, New York, Pennsylvania, South Carolina, and Utah. The public are protected from the action of the statutes, and, generally speaking, adverse possession does not give title to property against the public. Therefore, whether a highway, a park, or a navigable stream be regarded as belonging to the government or to the public, a person can gain no title or adverse claim by encroachments upon such public properties. Such encroachments by private parties may be removed by the government or town authorities. There has been much conflict in the courts as to how far to apply the doctrine of public interests to property belonging to municipal corporations and as to whether to regard their streets and parks as private property or as being vested in the public.

If the claim by adverse possession is one against public interests, the best of reasons exist that it should not be permitted. Every member of a community should be interested in preserving the public interests, and no one person can properly be allowed to appropriate the property of the public.

Nevertheless we find that many of the states give the right of adverse possession to individuals against municipal corporations. Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, Missouri,

[1] Carlisle *v.* Cooper, 19 N. J. Eq. 25 [1868]; A. P. Cook Co. *v.* Beard (Mich.), 65 N. W. Rep. 518.

[2] Shaughnessey *v.* Leary (Mass.), 38 N. E. Rep. 197.

[3] Omaha & R. V. Ry. Co *v.* Richards (Neb.), 57 N. W. Rep. 739; Ryan *v.* M. V. & S. I. R. Co., 62 Miss. 162 [1884].

* *See* Sec. 534, *supra*.

North Carolina, New York, Ohio, South Carolina, Texas, Vermont and Virginia are among those granting such adverse claims. California, Indiana, Louisiana, New Jersey, Pennsylvania and Rhode Island hold to the contrary rule.

While the title to public land is still in the United States no adverse possession of it can, under a state statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States against the legal title under a patent from the United States.[1]

It being a rule of property in California that title cannot be acquired to public property by adverse possession, the right of a city to open up a street once dedicated and accepted is not impaired by the fact that it has been fenced for about forty years, and occupied as a residence the greater part of the time, and that valuable buildings have been erected upon it.[2]

683. Prescriptive Rights Acquired by the Public in Ways.—There is some question whether mere user by the public of a way can make it a public highway, without any action of the town authorities, such as laying out, recording, improving, or accepting it. It is certain, however, that any use for a period less than that required by the statute of limitations will not establish it as a highway.[3]

To establish a highway by prescription there must be a user by the public, under claim of right, and adverse to the owner's occupancy, and with his knowledge, of some defined track uninterruptedly, without substantial change, for a period sufficient to bar an action to recover the land.[4]

The use for hunting purposes of streams terminating in private lands creates no right in the public when the lands have not been staked nor such trespasses forbidden.[5]

Permission to residents and visitors to pass over land to visit a beach does not of itself constitute such user as will make a highway by prescription. To constitute a highway by prescription, user must be adverse to the owner.[6] It is necessary that the public authorities take possession of the road, use, improve, and maintain it for the statutory period, to give it public character.[7]

If the use is shown to have been enjoyed for the full period, and the owner claims it was by license, the burden is upon him to show that the use was by permission and not adverse. The fact that the owner uses the same way does not lessen the claimant's right.[8] A contrary rule is held in Cali-

[1] Redfield *v.* Parks, 132 U. S. 239 [1889].

[2] London & San Francisco Bank *v.* City of Oakland (C. C.), 86 Fed. Rep. 30 [1898].

[3] Coakley *v.* Boston, etc., R. Co. (Mass.), 33 N. E. Rep. 930; State *v.* Wolfe (N. C.), 17 S. E. Rep. 528; *In re* a bridge, 100 N. Y. 642 [1885]; Cunningham *v.* San Saba Co. (Tex.), 20 S. W. Rep. 941.

[4] Engle *v.* Hunt (Neb.), 69 N. W. Rep. 970; Topeka *v.* Cowee (Kans.), 29 Pac. Rep. 560.

[5] Chisolm *v.* Cains (C. C.), 67 Fed. Rep. 285.

[6] Coburn *v.* San Mateo County (C. C. N. D. Cal.), 75 Fed. Rep. 520.

[7] State *v.* Horn (Kans.), 12 Pac. Rep. 148 [1887]; Leonard *v.* Detroit (Mich.), 66 N. W. Rep. 488.

[8] Wenger *v.* Hipple (Pa.), 13 Atl. Rep. 81 [1888].

fornia, where the fact that a strip of land has been continuously traveled and used by the general public as a highway for twenty years, with the knowledge of the owner of the fee, and without objection by him, does not justify a finding that the strip "is a public highway," since such facts are consistent with an absence of intention to dedicate and may indicate merely a license.[1] Under revised statutes of Indiana, providing that when a way has been used by the public for twenty years, it shall be deemed a public highway, the uninterrupted use of a road for such time, whether with the owner's consent or against his objection, constitutes it a public highway.[2]

Laws of New York 1890, c. 568, § 100 (General Highway Law) provides that "all roads which shall have been used by the public as a highway for a period of twenty years or more shall be a highway with the same force and effect as if it had been duly laid out and recorded." This law is of the same purport and meaning as the former statute, which provided that "all roads not recorded which have been or shall have been used as a public highway for twenty years or more shall be deemed public highways"; and use of a road by the public as a highway is necessary to create a highway by prescription.[3] Where plaintiff's grantor, more than fifty years ago secured from the state by petition, a grant authorizing the extension of a boat-landing on his land for "public convenience," which necessitated the use of a certain road from the boat-landing to the highway, and the road has ever since been used by the public, such road has become a public highway by long user.[4]

In Illinois, where a highway was laid out by the town authorities, and the landowners erected fences so as to make the highway forty feet further east than as laid out, and the public used the highway as so fenced for more than twenty years, the right of the landowners to fence in the forty-foot strip is barred by prescription.[5]

To what extent the public may acquire a prescriptive right of way over land depends in a measure upon the character of the land, its location, and the uses for which it may reasonably be employed. The public acquires no rights by mere user of a way over wild, unimproved, unoccupied, and uninclosed prairie, mountain, or forest lands.[6]

The fact that a landowner has permitted for a long period of years the residents of the neighborhood to pass over his land to an attractive beach on the seashore,[7] especially where the use has been occasional and varying and

[1] Cooper *v.* Monterey County (Cal.), 38 Pac. Rep. 106.

[2] Brown *v.* Hines (Ind. App.), 44 N. E. Rep. 655.

[3] People *v.* Osborn (Sup.), 32 N. Y. Supp. 358.

[4] Iselin *v.* Starin (Sup.), 24 N. Y. Supp. 748.

[5] Landers *v.* Town of Whitefield (Ill. Sup.), 39 N. E. Rep. 656.

[6] Cunningham *v.* San Saba Co. (Tex.), 20 S. W. Rep. 941; Engle *v.* Hunt (Neb.), 69 N. W. Rep. 970; People *v.* Osborn (Sup.), 32 N. Y. Supp. 358; Kurtz *v.* Hoke (Pa.), 33 Atl. Rep. 549.

[7] Coburn *v.* San Mateo Co. (C. C.), 75 Fed. Rep. 520; Mills & Allen *v.* Evans (Ia.), 69 N. W. Rep. 1043; Borough *v.* Alleghany Val. R. (Pa.), 25 Atl. Rep. 518.

only at certain periods or seasons, cannot be held a sufficient use to give the public a right of way by prescription.[1]

A way cannot be established over another's ground by prescription, where it shifts from one place to another as to any part of the route, but the same ground must be occupied all the while, and the way kept in repair on that ground.[2] While the use must be of substantially the same road all the time, the fact that the track, by reason of washing or other causes, by consent of the users of it, changes a few feet, sometimes to one side of the space appropriated, and sometimes to the other, does not destroy the right.[3]

684. Encroachments upon Public Ways.—Surveyors and engineers most frequently meet with incorporeal rights in running out old roads and streets, and in the location and maintenance of new ways, whether highways, canals, or railways. A frequent case is when encroachments have been made by abutting owners upon roads, and the surveyor is called upon to relocate the original line. Stony spots, ruts, and channels, wet, soft, and muddy places, cause teamsters to deviate and select new routes, and travel thus shifts from side to side, sometimes encroaching upon and at other times receding from opposite property owners, who follow up with their fences. This is no doubt the frequent cause of the sinuosities of roads. Easements cannot in general be acquired against the state or the public, unless expressly permitted by statute. Therefore in general the old line should be re-established and fences replaced when they have encroached upon public roads.

The public may, however, acquire easements in or over private property by adverse use for the full statutory period. The same circumstances and conditions must characterize the use as are necessary to give an individual the same rights in private property. The use by the public must therefore be adverse and under a claim of right, and not by permission. A gate erected across the way, and maintained and kept closed by the owner at certain times during the period, thus evincing an intention to exclude the public, interrupts the use and destroys any prescriptive rights not already fully acquired.[4] In case of an easement of an alley acquired by an individual, a gate maintained across the alley is of no consequence if the claimant used the way whenever he chose to do so.[5]

685. Prescriptive Rights Acquired over Railways.*—The reason that individuals cannot acquire prescriptive rights over or in highways is that it would be allowing adverse rights against the state, which cannot be put to the trouble of watching her innumerable roads and streets. This reason does

[1] State *v.* Wolfe (N. C.), 17 S. E. Rep. 528; Sutton *v.* Nicholaisen (Cal.), 44 Pac. Rep. 805. *But see* Taft *v.* Commonwealth (Mass.), 33 N. E. Rep. 1046.

[2] Follendore *v.* Thomas (Ga.), 20 S. E. Rep. 329; Hoyt *v.* Kennedy (Mass.), 48 N. E. Rep. 1073 [1898].

[3] Kurtz *v.* Hoke (Pa.) Sup.), 33 Atl. Rep. 549.

[4] Shellhouse *v.* State (Ind.), 11 N. E. Rep. 484 [1887].

[5] Demuth *v.* Amweg, 90 Pa. St. 181 [1879].

* *See* Sec. 535, *supra*.

not exist with regard to railroads, and therefore an open, uninterrupted, and adverse use for the statutory period will give a right of way over the location of a railroad although the road is in actual operation.[1] The existence of a statute forbidding walking or riding or driving upon a railroad-track will not defeat the prescriptive rights, as these acts are unlawful only when done without the railroad's consent.[2]

Title by adverse possession may be obtained to land which a railroad company acquired by its charter in fee, and which, though it abutted and paralleled its right of way, the company did not, and was not compelled to, include in nor maintain as such.[3]

Where a railroad company has built its station on lots bounded by two streets, and has left vacant a strip of land parallel to each street, to be used as an approach to the station, which strip was paved by the company, and there was no intention to dedicate this land to the public, it was held that although such land had been so left open for more than twenty years, and had been used by the public as part of the streets, there was neither a common-law dedication nor a prescriptive title in the public.[4]

To support claim of adverse possession by the owner of the servient estate against the easement of a railroad, it must distinctly appear that his occupancy is hostile to that of the railroad and inconsistent therewith.[5]

One who cultivates and raises crops on the right of way of a railroad may acquire title thereto by adverse possession, although the railroad company runs trains over the track laid thereon.[6]

As prescriptive rights may be acquired over railroads, so may railroads acquire right of way over, and user in, private property. Such adverse possession and user of a public street, however, gives no right as against the public, or against individuals who have the right or easement of passing over the street; and though the railroad has purchased the fee of the land in a public street, such act does not authorize it to construct its road upon such street, as against the public, without express authority of law.[7] Adverse and continuous use by a railway company of a strip of land as a right of way creates an easement by prescription.[8] The North Carolina courts have held that a

[1] Wisher *v.* N. Y. & N. E. R. Co., 135 Mass. 197 [1883]; Hardy *v.* Alabama & V. Ry. (Miss.), 19 So. Rep. 661.

[2] Turner *v.* Fitchburg Ry. Co. (Mass.), 14 N. E. Rep. 627 [1888]; Spottiswood *v.* Morris & E. R. Co. (N. J.), 40 Atl. Rep. 505 [1898]; Clafflin *v.* Boston, etc., R. Co. (Mass.), 32 N. E. Rep. 659. *But see* Andries *v.* Detroit, etc., Ry. Co. (Mich.), 63 N. W. Rep. 526; *and* Massachusetts Statutes 1861, ch. 100, preventing the acquisition of railroad land by adverse possession; *and* Littlefield *v.* B. & A. R. Co. (Mass.), 15 N. E. Rep. 648 [1888].

[3] Illinois Cent. R. Co. *v.* Wakefield, 173 Ill. 564.

[4] Chicago *v.* Chicago, R. I. & P. Ry. Co. (Ill. Sup.), 38 N. E. Rep. 768.

[5] Wilmot *v.* Yazoo & M. V. R. Co. (Miss.), 24 So. Rep. 701 [1899].

[6] Paxton *v.* Yazoo & M. V. R. Co. (Miss.), 24 So. Rep. 536 [1899]. *See* Nashville, etc., Ry. *v.* Reynolds (Tenn.), 48 S. W. Rep. 258 [1898], *and* Brayden *v.* New York, etc., R. Co. (Mass.), 51 N. E. Rep. 1081.

[7] Atty. Gen. *v.* M. & E. Ry. Co., 19 N. J. Eq. 386 [1869].

[8] Texas & P. Ry. Co. *v.* Gaines (Tex. Civ. App.), 27 S. W. Rep. 266; Johnson

railroad company cannot obtain title to a right of way over land by prescription, since it can obtain such easement through the exercise of its right of eminent domain without the owner's grant or consent.[1]

686. Tacking the Use of Successive Holders.—The same conditions and circumstances that enable a subsequent holder to claim the benefits of his predecessor's adverse possession will enable a successor to claim the benefit of his grantor's adverse user and enjoyment of an easement. Privity of estate is necessary in order that successive holders of land may have the benefit of the possession of those who have held before them. The possession of the successive occupants must be connected by purchase, descent, or devise, in order that the periods of their possession may be added together to make the full statutory period. The relation between the claimants who have successively had possession must be that of ancestor and heir, grantor and grantee, or devisor and devisee. There should be privity either of contract, blood, or estate. Some deed or instrument sufficient in form for the purpose of carrying title is an essential ingredient to constructive possession. The connecting link must in general be a valid deed or conveyance. A constructive possession for less than the statutory period is in the nature of an incorporeal right and cannot be transferred by livery of seisin. The prior possessor may have a right to say who shall have and continue this wrongful possession or inchoate right, and may transfer it by sale or gift, but the transfer must be by deed or by law.[2]

In tacking or uniting the possessions of two or more successive occupants who have held under color of title, the entire possession will be confined to the metes and bounds described in the prior holder's color of title. If more is claimed, it must be shown that the possession of it was delivered as part of the lands sold or conveyed. If one is in possession of a strip of land together with adjoining land, and deeds the adjoining land, giving possession of both, the possession of the strip by the grantor may be tacked to that of the grantee to make the full period necessary to give title.[3]

It is universally admitted that interest acquired by possession will descend to the heir without interrupting the running of the statute, and there is no good reason why the ancestor may not voluntarily dispose of his possessory interest. The mode of transfer may give rise to questions between the parties to the transfer; but as respects the rights of a third person against whom the possession is held adversely, it is immaterial, if the successive transfer of the possession were in fact made, whether it was made by will, by deed, or by mere agreement, either written or verbal.[4] It is necessary that an occupant

v. Owensboro, etc., Ry. Co. (Ky.), 36 S. W. Rep. 8; Ryan *v.* M. V. & S. I. R. Co., 62 Miss. 162 [1884].

[1] Narron *v.* Wilmington & W. R. Co. (N. C.), 29 S. E. Rep. 356 [1898].

[2] Simpson *v.* Downing, 23 Wend. 316.

[3] Faloon *v.* Sunshower, 22 N. E. Rep. 835.

[4] McNeely *v.* Langan, 22 Ohio St. 32. *See also* 50 Mo. 536; Weber *v.* Anderson, 73 Ill. 439.

claim under the prior holder in order to avail himself of the prior holder's adverse possession.[1]

In Connecticut and in some other states continued uninterrupted possession for the full statutory period, whether by one person or more, is sufficient. The possession must be connected and continuous, so that there shall be no time during which the possession of the true owner shall have intervened, and such connection and continuity may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor or of his possession, and which is accompanied by an actual transfer of possession in fact.[2]

687. What is Privity of Estates.—What will constitute privity, or what will not, is a difficult question; but it is certain that if any moment of time exists after the transfer is made, that the property is not occupied, the legal possession of the real owner asserts itself and is restored, which destroys the continuity of the two successive possessions. The continuity must be proven, it will not be assumed; and testimony that the prior holder merely sold to the subsequent holder is too vague to show privity between them. There must be evidence showing what was sold, good will, title, or possession. It must be shown that the actual possession of an estate was delivered, that the boundaries were defined and limited, and that each successive holder has possessed and claimed the same particular parcel the ownership of which is the subject of dispute.[3]

A widow cannot tack her possession to that of her deceased husband unless by deed or devise, because the seisin went to the heirs of the husband, or the seisin of the true owner revived. Right of dower is not enough.[4] This is so even though the widow resided with her husband on the land during his possession.[5] Privity of successive possessors may be shown by parol evidence.[6] Nor can a remainderman tack his possession to that of the tenant for life, because the remainderman cannot bring action against the disseizor until he has title[7] or possession, and therefore the disseizor has not had possession for twenty years after the right accrued.[8]

A sheriff's deed is of itself good "color of title"; but if unaccompanied by judgment or execution, it is not evidence of the sheriff's authority to sell, and is not, therefore, sufficient evidence of privity between the purchaser and the prior adverse occupant.[9]

[1] Am. & Eng. Ency. Law 271.

[2] 3 Gray's Real Property 114 *and cases cited.*

[3] Potts *v.* Gilbert, 3 Wash. C. C. 475. *See also* Clapp *v.* Birmingham, 9 Cow. 563; Moore *v.* Collishaw, 10 Pa. St. 224; Schrack *v.* Zubler, 34 Pa. St. 38; People *ex rel.* Mitchell *v.* Haws, 20 How. 29–32; Doe *v.* Brown, 4 Ind. 143; San Francisco *v.* Fulde, 37 Cal. 349.

[4] Sawyer *v.* Kendall (Mass.), 10 Cush. 241.

[5] East Tennessee Iron & Coal Co. *v.* Walton (Tenn. Ch. App.), 35 S. W. Rep. 459.

[6] Weber *v.* Anderson, 73 Ill. 439.

[7] Boynton *v.* Middlesex Mut. Fire Ins. Co., 45 Mass. 215.

[8] *See* Haynes *v.* Boardman, 119 Mass. 414.

[9] Kendrick *v.* Latham (Fla.), 6 So. Rep. 871

An invalid sheriff's deed will not constitute privity between the purchaser and the person whose property is sold.[1] Where land is sold under a judgment, one in occupation cannot tack the time he held after sheriff's sale to his possession had before the sale.[2] A corporation cannot tack its possession to that of the individual members of the corporation even when organized as a voluntary society for furthering the purpose of such members.[3] In South Carolina it has been held that an heir can tack his possession to that of his ancestor,[4] but that a purchaser cannot have the benefit of his vendor's possession.[5]

Courts have gone to great lengths in presuming grants when it conduced to justice and quieted men in their possessions. In a case where the statute operates mere length of time less than that prescribed by statute, can never be a presumptive bar. Length of time accompanied by circumstances which render it probable that a grant was made may be a presumptive bar.[6] No written instrument is necessary to establish privity where the possession is actual; but if the possession is constructive only, a written contract is essential.[7] Adverse possession of inclosed lands by a donee before deed may be coupled with possession after the deed is given.[8]

An abandonment or vacating of the premises by the grantor, the premises remaining vacant a short time before the grantee took possession, was held to prevent tacking the grantor's to the grantee's possession.[9]

688. Disabilities to which Owner of Servient Estate is Subject.—The grounds on which claims to property were allowed after an adverse possession for a long time were (and are) that a grant or title was presumed to have been given and that the occupant entered under it. If such a grant were impossible, or if the true owner had no legal right or capacity to make such a grant, then the presumption fails and the possession is not adverse. This incapacity of the grantor is called "disability," and it may arise from infancy, coverture, absence, imprisonment, etc., or from any cause that would destroy the presumption of a grant. The same law of disabilities to adverse user is applied to incorporeal rights as belongs to corporeal rights. The law was very unsettled on these points in its earlier history in this country, but there can be little doubt of the general correctness of the above statements at this date.[10] The presumption of right operates in strict analogy to the statutes of limitation, and whatever disabilities are allowed by them will be recognized in prescription.[11] A second disability cannot be added to one which existed

[1] 22 Ga. 46.
[2] 53 Ga. 320.
[3] Reformed Church *v.* Schoolcraft, 65 N. Y. 134.
[4] Williams *v.* McAliley, Cheeves 200.
[5] King *v.* Smith, Rice 10. *See* Haynes *v.* Boardman, 119 Mass. 414.
[6] Swift, Ch. J., in Bunce *v.* Wolcott, 2 Conn. 27.
[7] Kendricks *v.* Latham (Fla.), 6 So. Rep. 871.
[8] Sanders *v.* Logue, 12 S. W. Rep. 722.
[9] 36 Miss. 504.
[10] Ballard *v.* Demmon (Mass.), 31 N. E. Rep. 635.
[11] Renier *v.* Slater. 20 Pa. St. 458; Tracy *v.* Atherton, 36 Vt. 503.

when the adverse possession began, even though there has been no time when the owner was free. Disabilities cannot be tacked in prescription any more than in adverse possession. To tack successive users or periods of enjoyment there must be privity between the parties either of contract, blood, or estate.

If there has existed a period, however short, in which the disability was removed or destroyed, it will set the statute running from that time. If a man lives for one day after his cause of action has accrued, and then dies, leaving infant children, their infancy will not prevent the statute from running, though there be no time during the period when they could have sued. Once in motion the statute cannot be interrupted by subsequent disabilities. If the possession remains adverse and continuous until the full period has passed, the right to enter is gone forever.

Like every other assertion of the law, this statement must be taken with certain qualifications. This is a subject that has received special legislation. In some states it has been enacted that civil war and absence from the state would postpone the operations of the statute.[1]

Outside of these few exceptions it may be said that the universal rule is well settled that, when the statute of limitations has begun, it will not be interrupted by any subsequent disability. The operation of the statute is prevented only so long as that disability continues which existed when the cause of action accrued. A subsequent disability cannot be added to bar the statute. Though the prior disability continues until after the later one has commenced, and though there has been no time during which the person could have brought his action, yet the subsequent disability cannot bar the statute.[2] The statutory period of adverse possession will commence to run the moment the prior disability has ceased to exist.

If this were otherwise, it is claimed that the objects of the statute would be defeated. If successive disabilities could be united, old claims might be preserved until all evidence respecting them had been obliterated, and might then be used to annoy claimants who might have already enjoyed undisturbed possession for half a century or more. Such a law would be contrary to the spirit, meaning, and express purposes of the statute and to the whole theory of adverse possession.[3]

Statutes also exist which require that the statute begin to run during the disability, as in Connecticut, where the law allows but five years in which to make entry after the disability is removed. In this case either it must be admitted that the period of limitations in such a case is shortened by ten years, or that the statute began to operate against the true owner ten years before the disability was destroyed. Whether by the theory of pre-

[1] 13 Amer. & Eng. Ency. Law 732.

[2] *Note.*—If this be maintained, it must be upon some other theory than that of a presumptive grant. If there has been no time in which the owner could assert his claim in court, then there has been no time in which he could have made a conveyance, and therefore there can be no presumptive grant.

[3] Bunce *v.* Wolcott, 2 Conn. 27.

sumption or by the arbitrary power of the legislature, the rule is fully established that, when the statute has commenced to run, it runs through all subsequent disabilities and intermediate events and conditions that may surround the true owner.[1]

When a man who was insane when disseized subsequently recovered his reason for a time, but again relapsed into insanity, it was held that the statute was set in motion by his sanity, and that the relapse did not affect its running. If a person is under more than one disability when his land is taken possession of by an adverse claimant, he is not obliged to act until the last disability is removed. The owner may elect whichever disability he may choose to excuse his delay in asserting his rights to the property.[2] Thus an infant woman marries and becomes insane, and is afterwards disseized; she becomes of age at twenty-one, is a widow at forty, and recovers reason at sixty. Here are three disabilities all existing when she is disseized; therefore the statute of limitations will not run until the last disability is removed. If her marriage and insanity had taken place after her disseisin, then the statute would have commenced when she became of age (at twenty-one years of age). If the disseisin had taken place while she was under age and married, and she afterwards became insane, then the statute would have begun when she became a widow.

The burden of proof rests on one claiming an easement by prescriptive right, arising from user for the statutory period, to show that during all of such period the servient estate was owned by persons free from legal disability.[3]

It is a universal rule that exemptions from the operation of the statute are privileges given by the statute itself, and cannot be allowed if not expressly provided for by the statute. The language of the act must prevail; no departure is justified on account of inconvenience or hardships.[4] A remarkable case illustrating this rule in a striking way was decided in the United States courts. A railroad company held bonds of a city, and attempted to sue upon them. The mayor and common council each year as soon as elected met in secret places with locked doors, transacted necessary business for the year, and resigned, which resignation took effect immediately. The city was, in this way, able to evade summons, and for ten years was without officers. The court held that in equity fraudulent concealment might form an exception to the statute, but that for a debtor to evade service of process was not fraudulent in the legal sense of the term, however morally wrong or dishonest it might be.[5]

[1] 13 Amer. & Eng. Ency. Law 732, 733, *and cases cited.*

[2] 1 Amer. & Eng. Ency. Law 735.

[3] Saunders *v.* Simpson (Tenn.), 37 S. W. Rep. 195.

[4] 1 Amer. & Eng. Ency. Law, 735, *and cases cited.*

[5] Amy *v.* Watertown (Wis.), 22 Fed. Rep. 418; *affirmed in* 130 U. S. 320. *See also* Nash *v.* El Dorado Co. (Cal.), 24 Fed. Rep. 252, *and* 71 Ia. 147.

In general, when there is no person to sue or be sued the statute will not begin to run; there must be in existence some one who can sue and somebody who can be sued. When, therefore, an action accrues to the estate of a deceased person, the statute does not run until a representative has been duly qualified. This is understood to be the general rule everywhere.[1] Accordingly the statute does not run against a town until it is incorporated and has capacity to sue.[2] In California the statute runs nevertheless, although there be no parties to sue or be sued.[3]

War, fraud, and concealment will in some states suspend the statute. The war must consist of invasion, rebellion, or insurrection, which disturbs or stops the peaceable course of justice, or which closes the doors of the courts. The courst must be closed or interrupted. An occasional invasion by hostile Indians is not enough, unless the business of the court is stopped. An act of Congress to suspend the operation of the statute will bind state as well as federal courts; but it is held to the contrary in Louisiana.[4] Courts will take judicial notice of the beginning and end of a civil war, or of the supervision of the statute, without its being pleaded or proven.[5]

In bringing an action near the end of the period, it is pretty well settled that if the writ is sworn out and delivered for service within the statutory period it will save the suit. It stops the running of the statute, for the statute does not run against a claim while it is in litigation. Complaints are permitted to be amended after the period has elapsed; and in some states it has been held that the statute does not apply when the suit has been disallowed because it was brought in a wrong court,[6] but does apply when the suit has been dismissed for want of jurisdiction.[7]

Trial need not be had, or judgment obtained, during the statutory period. If the suit is begun, it is sufficient. An action of ejectment brought by the owner and afterwards dismissed will not interrupt or suspend an adverse possession; but if it be successful and judgment is obtained, the operation of the statute is interrupted from the bringing of the suit.[8]

In computing the time from one event, as an act of disseisin or taking possession, it is a general rule that the day on which the act is committed or instrument is delivered is not counted, but is excluded. This is equally true of contracts. It is not an inflexible rule, but will give way to a manifest contrary intention in a statute or contract.

Before the married woman's acts were passed, marriage (or coverture, as it is generally spoken of in law) was a disability which denied her any separate recognition in a court; but now that a married woman can sue and be sued as if she were single, that is no longer a disability, nor is there any reason why

[1] 13 Amer. & Eng. Ency. Law 737.
[2] 18 Mo. 220; 2 Lea (Tenn.) 694.
[3] 1 Amer. & Eng. Ency. Law 737.
[4] 13 Amer. & Eng. Ency. Law 738, 739.
[5] 13 Amer. & Eng. Ency. Law 744.
[6] Bonney *v.* Stoughton, 122 Ill. 536.
[7] McIntyre *v.* Mich. State Ins. Co., 52 Mich. 188.
[8] 1 Amer. & Eng. Ency. Law 275.

she should be exempt from the statute. This is the general law, but there are exceptions.[1]

689. Prescriptive Rights in General. — Prescriptive rights may be acquired in any incorporeal right or interest the use of which gives to the owner of the servient estate a right of action against the trespasser or person exercising such user. The subject of prescriptive right in the numerous interests incident to land has been discussed in the several chapters treating of these special subjects; it will therefore be a waste of time and space to review the subjects here, and the reader is referred to those sections in the several chapters mentioned for the particular treatment of prescription in regard to those rights.*

Prescriptive rights to invade and take natural rights incident to property may be acquired in any case, as before stated, if the invasion and appropriation of such rights gives the owner a just cause of action against the trespasser. Therefore rights may be acquired in minerals and fluids pervading the earth, to pollute the air, water, and light, to violate and disturb the quiet and peacefulness that belongs to nature.

Prescriptive rights may be acquired to violate the rights of possession either to land or to things incident to land. Essentially prescription is a negative right—the right to invade the rights of others. It would be more sensible to call it a prescriptive wrong, which after long use or abuse becomes a right.

The subject is continued in the succeeding chapters on Rights of Way, and other topics of peculiar interest in construction work.

[1] 13 Amer. & Eng. Ency. Law 740; Rep. 231.
Randolph *v.* Casey (W. Va.), 27 S. E.

* *See* Secs. 107, New Channel of a Stream; 183, Eaves Drip; 185, Surface Waters; 212, Polution of Waters; 262, Underground Waters; 325, 326, Lateral Support; 500–503, Boundaries; 511–540, Adverse Possession; 641–660, Easements; 661–670, License; 701–710, Dedication; 711–730, Rights of Way.

CHAPTER XXXV.

DEDICATION TO PUBLIC OF RIGHTS IN LAND.

701. Origin and Character of Dedication.—The principles of the law of dedication had their origin in the early common law. The earliest recognition of the doctrine of dedication of easements and the public use thereof appears in two comparatively modern decisions,[1] and it has since been fully and generally recognized as a familiar and undoubted principle of the law.

Dedication has been well defined as "an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public."[2] It is said that the doctrine of dedication is founded in public convenience. The owner of the fee, however, does not make the dedication primarily for the convenience of the public, but for some advantage which will accrue to him by having the public make use of the easement granted.

A common-law dedication of land must be made to the public. It cannot be to an association of persons or to a private corporation, as a railroad company.[3] No particular formality is necessary to constitute a good dedication at common law. It may be established by grant or written instrument, or by the acts and declarations of the owner of the premises. The vital principle of dedication is the *intention* to dedicate, and whenever this is unequivocally manifested the dedication, so far as the owner of the soil is concerned, has been made.[4]

If the dedication be accepted and used by the public in the manner intended, the dedication is complete, precluding the owner and all claiming under him from asserting any ownership inconsistent with the easement granted. A common-law dedication does not pass the legal title to the land, but it is sufficient to defeat an action at law for the recovery of the possession of the property as against those who are using it in accordance with the object

[1] Rex *v.* Hudson, 2 Strange 909 [1732]; Lode *v.* Shepherd, 2 Strange 1004 [1735].

[2] Angell on Highways (3d ed.), chap. 3, § 132.

[3] Lake Erie, etc., R. Co. *v.* Whitham (Ill.), 40 N. E. Rep. 1014.

[4] De Grilleau *v.* Frawley (La.), 19 So. Rep. 151.

and purpose of the dedication. The mere use, however, of a road over private land by the public will not make it a public road.[1]

Statutory dedications are made, and can only be made, in strict compliance with the statute, and compliance with the statute will dispense with the necessity for any assent or acceptance on the part of the public. An acceptance by the public, however, may cure an incomplete statutory dedication and make it a good common-law dedication.[2] To determine the requisites for a statutory conveyance the statutes of the several states must be consulted.

702. Purposes of Dedication.—The fundamental reason for making a dedication is a selfish one. The dedicator, except in a few cases, does not make the dedication because of his love for mankind, but because he expects, by conferring upon the public some use in his lands, to enhance the value of his estate. When, for instance, a town or city increases in size or population, and land on the outskirts is cut up into building-lots, unless there be some way of reaching these lots they are valueless for the purpose for which they are intended. The owner lays out streets through his land and dedicates them to the public, and thus the lots have a commercial value. The public in such a case benefits, as it has the full use of these streets, but the dedicator of the streets had no thought of benefiting the public except in so far as he himself might be benefited. The same holds true when the owner of land dedicates a park or square to the public. Of course there are some wealthy people who dedicate parks and squares to the public from purely philanthropic motives, but this class of persons is very small as compared with those who dedicate for strictly commercial reasons.

By the early common law dedication was confined to highways, as the need for the dedication of public parks, squares, etc., was not then felt.[3] In this country, however, the doctrine has a wider application and its limit has been judicially extended so as to include parks, public squares, school-lots, burying-grounds, lots for church purposes, and other charitable uses generally.[4] The dedication of public squares, parks, school-lots, and lots for charitable purposes is usually made by the public authorities for the benefit of the whole community. The same rules of law apply to the dedication of squares, parks, school-lots, etc., as apply to the dedication of highways.[5]

In the case of the dedication of bridges to the use of the public the same rules also apply, with the exception that unless a bridge is used by the public

[1] Dicken *v.* Liverpool Salt & Coal Co. (W. Va.), 23 S. E. Rep. 582; Tutwiler *v.* Kendall (Ala.), 21 So. Rep. 332.

[2] Fulton *v.* Mehrenfeld, 8 Ohio St. 440; Baker *v.* Johnson, 21 Mich. 319; Sargeant *v.* Bank, 12 How. (U. S.) 371; Waugh *v.* Leech, 28 Ill. 488.

[3] Baker *v.* Johnson, 21 Mich. 319; Post *v.* Pearsall, 22 Wend. (N. Y.) 425.

[4] Mowry *v.* City of Providence, 10 R. I. 52.

[5] Hoadley *v.* San Francisco, 50 Cal. 265; Doe *v.* Attica, 7 Ind. 641; Warren *v.* Lyons, 22 Iowa 351; Mankato *v.* Willard, 13 Minn. 23; Price *v.* Thompson, 48 Mo. 363; New York *v.* Stuyvesant, 17 N. Y. 34; Langley *v.* Gallipolis, 2 Ohio St. 107; Pearsall *v.* Post, 20 Wend. (N. Y.) 111; Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469; State *v.* Atkinson, 24 Vt. 448.

it may be indicted as a nuisance. In the case of a highway the dedication is complete when the public accepts and uses the way. If, however, after acceptance the public should cease to use the way, this fact would have no effect on the dedication; the question of continued usage, in regard to a highway, is not material. In the case of a bridge, however, it seems that there must be something more than the mere acceptance on the part of the public: there must be some need for the bridge. The fact that the bridge has been used for some time is *prima facie* evidence that it is not a nuisance.[1]

703. What Constitutes a Dedication.—What constitutes dedication is a very important question, not only for the owner of the land, but also for the engineer. A landowner who is ignorant of the law employs an engineer to survey a piece of land and lay it out in town or city lots. To add to the attractiveness of the site for residential purposes, the landowner has the engineer survey and map out a park or a square, and the land is sold from maps and surveys made by the engineer, with the lots abutting on the park or square as designated. After some of the lots have been sold from the map it may seem advisable to the landowner to change the location or abolish the park or square. Then the question arises whether there has not been a dedication to the public of the park or square, and the landowner may be estopped from interfering with it. Such questions as this make it advisable that the engineer have at least a general knowledge of the principles of dedication, so that he may avoid causing his employer needless loss or litigation which was not contemplated by the owner.

The real test to determine whether there has been a valid dedication is whether the owner of the land *intended* that the public should have the use of the land. If it can be shown that the owner of the fee intended the public to have an easement in the land, and if it also can be shown that the public used the easement intended, then the dedication is complete and the dedicator is bound by it. No particular form is necessary in making a dedication. No grant is required.[2]

The legal title to the land does not pass from the dedicator, but after the dedication he owns the fee subject to the right or use dedicated.[3]

Dedication may be made by parol and proved by parol, the only necessary elements being that the owner of the premises intend that the public shall have a certain use or right in his land, and that the public accept the use of the land intended.[4] The intention to make a dedication must be clearly

[1] State *v.* Carpenter, 2 N. H. 513; Williams *v.* Cunningham (Mass.), 18 Pick. 312.

[2] McConnell *v.* Lexington, 12 Wheat. (U. S.) 582; Town of Pawlet *v.* Clark, 9 Cranch (U. S.) 292; Winona *v.* Huff, 11 Minn. 114; Doe *v.* Jones, 11 Ala. 63; Bryant *v.* McCandless, 7 Ohio, Pt. II. 135; Klinkener *v.* School District, 1 Jones (Pa.) 144.

[3] Lode *v.* Shepherd, 2 Stra. 1004; Dubuque *v.* Maloney, 9 Iowa 450; Beatty *v.* Kurtz, 2 Pet. (U. S.) 266; Kelsey *v.* King, 33 How. Pr. (N. Y.) 39; New Orleans *v.* U. S., 10 Pet. (U. S.) 662; Hanbury *v.* Woodland Lumber Co. (Ga.), 26 S. E. Rep. 477.

[4] Marcy *v.* Taylor, 19 Ill. 634; Mayor of Macon *v.* Franklin, 12 Ga. 239; Hall *v.* McLeod, 2 Metc. (Ky.) 98; Institute *v.*

shown, but the intention may be gathered from acts and declarations of the owner in connection with all the circumstances which surround the subject in each particular case.[1]

A dedication may be inferred from a long and uninterrupted use by the public with the knowledge and consent of the owner;[2] but where the dedication is based on the mere fact alone of user by the public, it has been held that it is necessary to show that the user was adverse, that is, with a claim of right; and that the claim and user were uninterrupted for the period required by the statute of limitations.[3]*

Where a landowner has an engineer survey his land into lots, streets, and squares, the mere act of surveying and mapping the streets and squares will not, in itself, amount to a dedication;[4] yet a sale of the lots with reference to the engineer's map or plan, whether recorded or not, will amount to an immediate and irrevocable dedication of such streets and squares so far as the owner is concerned.[5]

Where a city unlawfully takes land for street purposes without the owner's knowledge and constructs a street thereon, the fact that the owner afterwards acquiesces in the taking, and tenders the city a deed if it will make compensation for the land taken, is not sufficient to imply a dedication of the land so as to deprive the owner of the right to sue for compensation.[6]

There may be a dedication of government lands, but the evidence from which consent to user will be inferred must be more than usually clear to be conclusive in such cases.[7] The reason for the strictness of this rule is that such lands are usually wild and unfenced, free to public access, and therefore it cannot readily be presumed that any special dedication can be intended. The same rule is applied to waste and unfenced land owned by private individuals.[8] Intention to dedicate will be more readily presumed in the case of city or town land than in the case of country land, and in the case of well-

How, 27 Mo. 211; Oswald *v.* Grenet, 22 Tex. 94; Gentleman *v.* Soule, 83 Am. Dec. 264.

[1] Columbus *v.* Dahn, 36 Ind. 330; Morgan *v.* Railroad Co., 96 U. S. 716.

[2] McKey *v.* Hyde Park Village, 10 Sup. Ct. Rep. 512; Coburn *v.* San Mateo County (C. C.), 75 Fed. Rep. 520; Shellhouse *v.* State (Ind.), 11 N. E. Rep. 484; Klenk *v.* Town of Walnut Lake (Minn.), 53 N. W. Rep. 703; McKenzie *v.* Gilmore (Cal.), 33 Pac. Rep. 262.

[3] Wilson *v.* Acree (Tenn. Sup.), 37 S. W. Rep. 90; Remington *v.* Millerd, 1 R. I. 93; Thayer *v.* Boston, 19 Pick. (Mass.) 511; Talbot *v.* Grace, 30 Ind. 389; Green *v.* Oakes, 17 Ill. 249; Smith *v.* State, 3 Zab. (N. J.) 130, 712. *See also* Onstott *v.* Murray, 22 Iowa 457, where the conflict in the cases is reviewed.

[4] United States *v.* Chicago, 7 How. (U. S.) 185.

[5] Van Witson *v.* Gutman (Md.), 29 Atl. Rep. 608; Pry *v.* Mankedic (Pa.), 34 Atl. Rep. 46; Harrison County *v.* Seal (Miss.), 5 So. Rep. 622; Heselton *v.* Harmon (Me.), 14 Atl. Rep. 286; Archer *v.* Salinas City (Cal.), 28 Pac. Rep. 839; Porter *v.* Carpenter (Fla.), 21 So. Rep. 788; Bissell *v.* Railroad Co., 23 N. Y. 61.

[6] Longworth *v.* City of Cincinnati (Ohio), 29 N. E. Rep. 274.

[7] Boston *v.* Lecraw, 17 How. (U. S.) 426; Phipps *v.* State, 7 Blackf. (Ind.) 312; Bigelow *v.* Hilleman, 37 Me. 52; Russell *v.* State, 3 Coldw. (Tenn.) 119.

[8] Ely *v.* Parsons (Conn.), 10 Atl. Rep. 499; Peyton *v.* Shaw, 15 Ill. App. 192; Reiner *v.* Stuber, 20 Pa. St. 458.

* See Secs. 511–540 and 671–690, *supra*.

settled or frequented country than in that of wild, wood, waste, or unfrequented land.[1]

Since dedication is the joint effect of an intention to appropriate land and an acceptance by the public, no presumption of dedication can be made where circumstances exist which negative the presumption to dedicate. Any act or course of action adopted by the owner with the evident intention of rebutting the intent to dedicate will be, when established, conclusive to that end.[2] A very common method is to put a gate or bar across the road to show that control over the road is reserved and thus rebut the presumption of intent to dedicate.[3]

704. Who may Dedicate.—A mere stranger without authority cannot, of course, dedicate lands to public use any more than he can deed them.[4] The dedication, in order to have any effect, must be made by the owner of the land.[5] A person having a power of attorney to sell and convey lands has no authority to make a dedication. Where an express power to dedicate is given to an agent, the owner is estopped from denying the validity of the dedication.[6] A person occupying government land cannot dedicate a way across these lands, nor can a way across it be acquired by prescription.[7] A mortgagor cannot make a good dedication as against the mortgagee, although as to all other persons he is regarded as the owner of the mortgaged land.[8] But if the mortgagee assents to the dedication, he will be bound by it, as will those claiming under him.[9] Mere silence of the mortgagee, however, will not prevent him or a purchaser at foreclosure sale from setting up his right to the property dedicated by the mortgagor.[10] There can be no dedication during a tenancy, however long continued, unless from the fact of notice or otherwise of the concurrence by the tenant in the dedication.[11] A married woman, though she cannot convey her estate, may have a dedication of a right of way over it presumed against her.[12] A trustee may make a valid dedication of the trust lands unless the dedication be inconsistent with the object of the trust.[13] A

[1] Wyman *v.* State, 13 Wis. 663; Worth *v.* Dawson, 1 Sneed (Tenn.) 59; Harding *v.* Jasper, 14 Cal. 643; State *v.* Thomas (Del.), 4 Harr. 568.

[2] Herhold *et al. v.* City of Chicago, 6 Am. & Eng. Corp. Cases 119; Batchelder *v.* Wakefield, 8 Cush. (Mass.) 243; Knowles *v.* Nichols, 2 R. I. 198; Carpenter *v.* Gwynn, 35 Barb. (N.Y.) 395.

[3] State *v.* Strong, 25 Me. 297; Proctor *v.* Lewiston, 25 Ill. 153.

[4] Bushnell *v.* Scott, 21 Wis. 457; Kyle *v.* Logan, 87 Ill. 67.

[5] Hoole *v.* Attorney-General, 22 Ala. 190; Post *v.* Pearsall, 20 Wend. (N. Y.) 111; Irwin *v.* Dixon, 9 How. (U. S.) 10; Lee *v.* Lake, 14 Mich. 12; Leland *v.* Portland, 2 Oreg. 46; Baxter *v.* Taylor, 1 Nev. & M. 13; Fisk *v.* Havana, 88 Ill. 208.

[6] Wirt *v.* McEnery, 6 Am. & Eng. Corp. Cases 105; U. S. *v.* Chicago, 7 How. (U. S.) 185; Brown *v.* Manning, 6 Ohio 298.

[7] Smith *v.* Smith. 34 Kans. 293.

[8] 2 Smith Lead. Cas. 95; Detroit *v.* Railroad Co., 23 Mich. 173.

[9] Gentleman *v.* Soule, 32 Ill. 271; Bushnell *v.* Scott, 21 Wis. 451.

[10] City of Moberly *v.* McShane, 7 Am. & Eng. Corp. Cases 405.

[11] Davis *v.* Stephens, 7 Carr. & Payne 570; Schenely *v.* Com., 36 Pa. St. 29; State *v.* Atherton, 16 N. H. 203; 83 Am. Dec. 264.

[12] Schenely *v.* Com.,36 Pa. St. 29; Ward *v.* Davis, 3 Sandf. (N. Y.) 502; Todd *v.* Railroad Co., 19 Ohio St. 514.

[13] Rex *v.* Leake, 5 B. & Adolph 469; Prudden *v.* Lindsley, 29 N. J. Eq. 615.

corporation may make a valid dedication unless such act be inconsistent with the charter and objects of the corporation.[1]

The parties to a dedication are the dedicator and the public. The right or easement dedicated inures immediately to the public and is limited and defined only by the wants of the community at large.[2] Where land is dedicated by a common-law dedication and there is no municipal body with authority to make a formal acceptance of the same, an acceptance by the public by actual use of the property dedicated and for the uses for which the dedication was made will be sufficient.[3]

705. Effect of Dedication.—When lands have been dedicated to the public and the public has enjoyed the use of the easement dedicated, and rights have been acquired by individuals or by the public by virtue of such dedication, the former owners are precluded from revoking the dedication.[4] Dedication will preclude the party making the appropriation from reasserting any right over the land, at least as long as it remains in public use, although there never was a grantee capable of taking the fee.[5] Where a street has been dedicated to the public by the owner of the fee, and where it has been used as a public street for a number of years, the dedicator cannot close the street because of the non-performance of an oral condition imposed at the time the street was opened.[6] Where land is dedicated to the public for a particular use, the dedicator retains all rights not inconsistent with the particular public use granted.[7] After land has been dedicated as a public street usually, the title may not be acquired by adverse possession however long or in what manner the land is held.[8]*

In a case where there is a variance between the plat and survey of a town-site the lines actually run must control, and these lines are conclusive against the purchaser.[9] A dedication of a portion of land for a private alley is a dedication of it to the use of the persons who shall thereafter become owners of the lots included in the plat, but not to the use of owners of land situated elsewhere.[10] Where an easement in lands is dedicated to public use, the public has no right in the land inconsistent with such use, and cannot convey it away.[11] A *bona fide* purchaser, without notice, of lands previously dedicated

[1] Macon *v.* Franklin, 12 Ga. 239; Wright *v.* Victoria, 4 Tex. 375; Green *v.* Canaan, 29 Conn. 157; Canal Co. *v.* Hull, 1 Man. & Gr. 392; Boston *v.* Le Craw, 17 How. (U. S.) 420; State *v.* Woodward, 23 Vt. 92.

[2] Cincinnati *v.* White, 6 Pet. (U. S.) 431; Post *v.* Pearsall, 22 Wend. (N. Y.) 425; State *v.* Wilkinson, 2 Vt. 480; Williams *v.* Society, 1 Ohio St. 478; Kennedy *v.* Jones, 11 Ala. 63.

[3] Maywood Co. *et al.* *v.* Village of Maywood (Ill.), 5 N. E. Rep. 866.

[4] Mayor *v.* Franklin, 12 Ga. 239; Haynes *v.* Thomas, 7 Ind. 38; Leffler *v.* Burlington, 18 Iowa 361.

[5] Kennedy *v.* Jones, 11 Ala. 63; Adams *v.* Saratoga R. Co., 11 Barb. (N. Y.) 414.

[6] Port Huron *v.* Chadwick, 52 Mich. 320.

[7] Stevenson *v.* Chattanooga, 4 Am. & Eng. Corp. Cases 503.

[8] City of Visalia *v.* Jacob, 6 Am. & Eng. Corp. Cases 115.

[9] Holst *v.* Streitz, 16 Neb. 249.

[10] Cihak *v.* Kleke, 17 Ill. App. 124.

[11] Pomeroy *v.* Mills, 3 Vt. 279; Alves *v.* Henderson, 16 B. Mon. (Ky.) 131.

* *See* Secs. 534 and 682–685, *supra*.

to public use acquires a good title.[1] Dedication by a city of a portion of water-front for public use, as a free dock, is merely the grant of an easement, and the right of entry and possession, subject to the easement, remains in the city.[2] Where land is dedicated for purposes which are strictly public there cannot be a dedication to a limited portion of the public, but the dedication must be to the public generally.[3]

Where one who has offered to dedicate land for a public street conveys such land before his offer is accepted, the conveyance operates as a revocation of the offer;[4] but where one dedicates land for public streets by platting it into lots and streets and filing map thereof he does not, by acts showing revocation of dedication before acceptance as to some of the streets, revoke the entire original dedication.[5] The death of the owner is a revocation of a proffered dedication of streets, and an acceptance thereafter by the village gives it no rights in the streets.[6]

706. Acceptance of Easement Dedicated.—A dedication may be complete so as to conclude the dedicator and those claiming under him, without any acceptance on the part of the public. Where the dedication has been made under a statute and the requirements of the statute complied with, no acceptance by the public is necessary.[7] In order, however, to charge the municipality or local district with the duty to repair, or make it liable for damages for injuries because it allowed a street or highway to be or remain out of repair, there must be an acceptance of the dedication, which acceptance must be made by the public or the authorized public authorities.[8] The acceptance need not be made immediately upon the offer of the dedicator to give the public a certain use of his lands, but may be made at any time during the continuance of the gift and before the tender is withdrawn.[9]

The decisions are not uniform as to whether the acceptance may be made by the public or whether it must be made by the proper authorities. The English rule seems to be that if there has been an acceptance by the public there need be no acceptance by the parish.[10] In the United States the rule does not seem to be settled, but the weight of authority seems to establish the doctrine that the dedication of a highway must be accepted by the proper

[1] Schuman *v.* Homestead, 1 Cent. Rep. 914.

[2] San Francisco *v.* Calderwood, 91 Am. Dec. 542.

[3] Trerice *v.* Barteau, 54 Wis. 99.

[4] City of Chicago *v.* Drexel (Ill.), 30 N. E. Rep. 774.

[5] Eckerson *v.* Village of Haverstraw, 39 N. Y. Supp. 635.

[6] People *v.* Kellogg, 22 N. Y. Supp. 490.

[7] Baker *v.* St Paul, 8 Minn. 491.

[8] Brigantine *v.* Holland Trust Co. (N. J. Ch.), 35 Atl. Rep. 344; Wheatfield *v.* Grundman, 164 Ill. 250; Alton *v.* Meeuwenberg (Mich.), 66 N. W. Rep. 571; Jordan *v.* City of Chenoa (Ill. Sup.), 47 N. E. Rep. 191; Gedge, etc., *v.* Commonwealth (Ky.), 9 Bush 61; Kennedy *v.* City of Cumberland (Md.), 9 Atl. Rep. 234 [1886]; Cincinnati *v.* White, 6 Pet. (U. S.) 431; Noyes *v.* Ward, 19 Conn. 250; State *v.* Trask, 6 Vt. 355.

[9] Simmons *v.* Cornell, 1 R. I. 519; Baker *v.* Johnson, 21 Mich. 319; Crockett *v.* Boston, 5 Cush. (Mass.) 182.

[10] Rex *v.* Leake, 5 B. & Adolph. 469; Canal Co. *v.* Hall, 1 Mam. & Gr. 392; Rex *v.* Lyon, 5 Dow. & Ry. 499; Regina *v.* Patrie, 30 Eng. Law & Eq. 207.

authorities charged with its repair.[1] To constitute a dedication of lands to the public there must have been an acceptance thereof by the public, which may be manifested by use or the expenditure of public money in the improvement of the land; but a mere occasional user of a highway, mostly by persons traveling on horseback, without any work being done upon the road, on which underbrush is allowed to grow up so as to render the road nearly impassable, is not sufficient to constitute an acceptance.[2] Evidence that streets dedicated to a city were kept open and used as public passways, and that the city graded and graveled them, is sufficient to establish an acceptance.[3] If the need for a public alley, at the time of its dedication, be small, slight evidence of acceptance by use of the public is sufficient.[4]

Where a landowner files a map of a number of blocks owned by him, on which one block is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, actual acceptance is not requisite to complete the dedication, since acceptance will be presumed from the benefit arising from the dedication.[5]

There is no established standard by which the use necessary to determine an acceptance by the public may be measured and declared to be sufficient. A use which would naturally follow from the character of the place and the settlement of the community is sufficient.[6] The principle that acceptance by the required authorities may be presumed from long user by the public has been accepted, in many cases, as one method by which such acceptance may be legally shown.[7] Unless the method of acceptance by the proper local authorities be prescribed by statute no particular or formal proceedings to establish an acceptance are necessary; the acceptance may be implied in case of a road by any acts which recognize the road as a public highway.[8]

707. Non-user of Right Dedicated.—The early doctrine of the common law established the principle that when a dedication had been made there could be no abandonment or loss of the right dedicated by mere non-user on the part of the public. More recent decisions, however, have departed from

[1] Hobbs *v.* Lowell, 19 Pick. (Mass.) 405; Dillon on Mun. Corp., § 505; Oswego *v.* Canal Co., 2 Selden (N. Y.) 257; Requa *v.* Rochester, 45 N. Y. 129; Kelly's Case, 8 Gratt. (Va.) 632; Blodget *v.* Royalton, 14 Vt. 288.

[2] Rosenberger *v.* Miller, 1 Mo. App. Rep. 640.

[3] Smith *v.* City of Buffalo, 35 N. Y. Supp. 635; City of Abilene *v.* Wright, 46 Pac. Rep. 715; Orriel *v.* City of Ft. Worth (Tex.), 32 S. W. Rep. 443; People *v.* Underhill, 23 N. Y. Supp. 388.

[4] Taraldson *v.* Town of Lime Springs (Iowa), 60 N. W. Rep. 658.

[5] Archer *v.* Salinas City (Cal.), 28 Pac. Rep. 839, *distinguishing* People *v.* Reed, 81 Cal. 70. *And see* Reid *v.* Board of Ed. of Edina, 73 Mo. 295 [1880]; Eureka, City of, *v.* Croghan, 19 Pac. Rep. 485 [1889]; Buffalo, City of, *v.* Delaware, L. & W. R. Co., 39 N. Y. Supp. 4.

[6] Winslow *v.* City of Cincinnati, 6 Ohio N. P. 47.

[7] Curtiss *v.* Hoyt, 19 Conn. 154; Muzzey *v.* Davis, 54 Me. 361; Oswego *v.* Canal Co., 6 N. Y. 257; Hemphill *v.* Boston (Man.), 8 Cush. 195; Manderschild *v.* Dubuque, 29 Iowa 73.

[8] Green *v.* Convon, 29 Conn. 157; Gibbs *v.* Larrabee, 37 Me. 506; Detroit *v.* Railroad Co., 23 Mich. 173; Parsons *v.* Trustees, 42 Ga. 529.

the strictness of this rule.[1] Where land has been dedicated to the public, the dedicator holds such land subject to the easement granted; but when the public has not exercised its right for a long space of time and it is evident that the public has abandoned the use of the land, then it is held that the right of the public is extinguished and the owner holds the land free from the easement.[2]

Where land was dedicated "for a city school provided the city or community do, within the time of five years from this date, respectively improve the same," and no improvements were made during that time, it was held that the title did not pass from the proprietor, and that the land was subject to seizure by creditors of the proprietor.[3] Land dedicated to public use for school purposes reverts to the dedicator upon its abandonment for such purposes.[4]

Where a city acquires rights in a street by dedication, its rights will be barred by non-acceptance and non-user on its part, and by the adverse possession of such premises by private persons and those through whom they claim.[5] But where a town-site company filed a plat with a square thereon designated as "Seminary Square," and sold and conveyed lots from its plat, and, until it went out of existence, never exercised any control over the square, and it was always treated as public ground, and for twenty years was not assessed, the fact that it had been vacant for that time did not bar the board of education from taking possession when a necessity for its use for educational purposes occurred.[6]

Where land was clearly dedicated for a street, it was not necessary that it should be accepted by the public or used for that purpose within any limited time, in the absence of a condition to that effect; and hence mere lapse of time of twenty-three years, without acceptance or user, was held not to constitute an abandonment.[7]

In Texas it has been held that by the abandonment of a road as a highway, the land covered by the highway, according to the civil law, became vacant public domain, subject to entry, and did not belong, as at common law, to proprietors whose lands were bounded by the road.[8]

708. Limits and Qualifications.—Property dedicated to the use of the public may be said to be restricted to the use for which it was intended to be dedicated. This rule has been construed, however, to include such uses as are consistent with or necessary to the principal use.[9]

[1] Knight *v.* Heaton, 22 Vt. 480; Hillory *v.* Walker, 12 Veasey 139; Beardslee *v.* French, 7 Conn. 125.

[2] Cooper *v.* Detroit, 42 Mich. 584; Fairfield *v.* Williams, 4 Mass. 427; U. S. *v.* Harris, 1 Sumner 21; Railroad Co. *v.* Patch, 28 Kan. 470; Neville Road Case, 8 Watts (Penn.) 172; Barclay *v.* Howell, 6 Pet. (U. S.) 498.

[3] Kemper *v.* Collins, 11 S. W. Rep. 245 [1889].

[4] School Dist. of Johnson Co. *v.* Hart, 28 Pac. Rep. 741.

[5] City of Edwardsville *v.* Barnsback, 66 Ill. App. 381.

[6] Wilgus *v.* Board of Com'rs (Kan.), 38 Pac. Rep. 787.

[7] Baltimore, City of, *v.* Frick (Md.), 33 Atl. Rep. 435.

[8] Mitchell *v.* Bass, 33 Tex. 259.

[9] Warren *v.* Grand Haven, 30 Mich. 24; Bayard *v.* Hargrove, 45 Ga. 342; City *v.*

Where land was dedicated and marked on a town plat "Market Square," it was held that this fact did not so conclusively show the intention of the owner that it should be used for market purposes as to defeat the dedication if the town failed to use it for that purpose.[1] A dedication of land to the public for a highway may be made subject to a right to designate a portion thereof for railroad purposes; and when such portion has been designated and devoted to railroad purposes the public use will be suspended, and remain suspended so long as such portion is devoted to such railroad purposes.[2] The presumption in regard to a street, in the absence of direct evidence, is that the public has acquired an easement for highway uses only in the land embraced by the street. A dedication of land for street purposes does not authorize the legislature to permit the construction of a steam railroad without making compensation to the owner of the fee.[3] *

If dedicated property be used for purposes other than those intended by the dedicator and for which the dedication was made, then not only the dedicator but any property owner will have a remedy in equity to prevent the wrongful use and to enforce the proper use.[4]

When property is once dedicated to the use of the public a municipal corporation or other trustee for the public cannot extinguish such public use or alienate the land, nor can such property be made liable for the debts of a municipality.[5]

709. Instances of Dedication.—Dedication is a subject for consideration with surveyors, engineers, and landscape architects in the performance of their professional duties. The last named especially delight in beautiful parks, beaches, and other public features, and it is a simple matter to sperad their plans and dreams upon paper to the delight of the landowner. No doubt such features are attractive to home-seekers and real-estate prospectors, but all parties should understand that when lots are sold or purchased with such features set forth it is *business* and not a dream nor remote possibility, but that the owner is irrevocably bound by such plan, and that he may not thereafter use for private purposes the land designated for such features.[6] †

The use of the proposed streets to describe land conveyed by the landowner raises a presumption at least of a dedication of the streets so long as the deed stands unreformed.[7] A sale of lots according to a plan showing

Hinkson; 87 Ill. 587; Price *v.* Thompson, 48 Mo. 361; Rutherford *v.* Taylor, 38 Mo. 315; Warren *v.* Lyons, 22 Iowa 351.

[1] Scott *v.* Des Moines, 64 Iowa 438.

[2] Avers *v.* Penn. R. Co. (N. J.), 3 Atl. Rep. 885.

[3] Fanning *v.* Osborne (N. Y.), 3 Cent. Rep. 453.

[4] Price *v.* Church, 4 Ohio 515; Hardy *v.* Memphis (Tenn.), 10 Heisk. 127; Harris *v.* Elliott, 10 Pet. (U. S.) 25; Carter *v.* City of Portland, 4 Oreg. 339; County *v.* Newport (Ky.), 12 B. Mon. 538.

[5] Price *v.* Thompson, 48 Mo. 363; Alton *v.* Co., 12 Ill. 60; Church *v.* Hoboken, 33 N. J. L. 13; Board *v.* Edson, 18 Ohio St. 221; Seebolt *v.* Shitler, 34 Pa. St. 133; Warren *v.* Lyons, 22 Iowa 351; Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234; New Orleans *v.* United States, 10 Pet. (U. S.) 662.

[6] Evans *v.* Blankenshirm (Ariz.), 39 Pac. Rep. 812.

[7] White *v.* Tide-water Oil Co. (N. J.

* *See* Secs. 756–780, *infra*.

† *See Sec.* 703, *supra*.

them to be on a street implies a grant or covenant to the purchaser that the street shall be forever open to the use of the public, and operates as a dedication thereof.[1] It will, as between the grantor and grantee, amount to an irrevocable dedication of the street;[2] and other cases hold it operates not only in favor of those who buy from the donor, but also in favor of all who purchase in the general plan of the locality when the way was located.[3]

If, however, in every deed or lease made by the owner a clause be inserted to the effect that the reference to the street is intended solely for the purpose of description, and is not intended to be a dedication of it for the public use or as a public highway, there will be no dedication of the street;[4] and the fact that the street was graded, paved, and curbed, and that lots had been sold and leased bounding on the street, and that houses had been built and leased fronting thereon, and that the gas company ran its pipes through the street to light these houses and erected city gas-lamps, and that various vehicles drove over the street to accommodate the residents of the houses, will not alter the case. If the owners maintain visible obstructions across one end of a street, while the public is using the remainder, and purchasers of abutting lots are told that the street is a private way, though lots be sold according to an unrecorded plat on which the strip involved was designated as a street, it will not, it seems, amount to a dedication.[5]

The mere fact that a public building is set back several feet from the front boundary of the lot,[6] or that a railroad company fails to fence its right of way and permits a portion of the public to cross it at a certain place,[7] or that the public has used its wharves and the city has lighted them,[8] or that an owner of land, in fencing the same, left a strip along a section-line from 8 to 12 feet wide, which he permitted the public to use, does not show an intention to dedicate any land within his inclosure.[9]

Mere permissive user of a way is insufficient to establish a dedication.[10] The fact that the owner of vacant and uninclosed land makes no dissent to the public's traveling over it in a certain route does not show an intention to dedicate.[11]

Ch.), 33 Atl. Rep. 47; Gt. Northern Ry. Co. *v.* St. Paul (Minn.), 63 N. W. Rep. 96.

[1] Quicksall *v.* Philadelphia, 177 Pa. 301.

[2] New York, etc., R. Co. *v.* South Amboy (N. J. Sup.), 30 Atl. Rep. 628.

[3] Wilson *v.* Acree (Tenn.), 37 S. W. Rep. 90.

[4] Baltimore *v.* Fear (Md.), 33 Atl. Rep. 637.

[5] People *v.* Sperry (Cal.), 48 Pac. Rep. 723.

[6] Baker *v.* Squire, 1 Mo. App. Rep. 683. Yet while not in itself a dedication, the moving back of a fence from a highway is evidence tending, in connection with other facts, to prove it. Neal *v.* Hopkins (Md.), 39 Atl. Rep. 322 [1898].

[7] Vicksburg, etc., R. Co. *v.* Monroe (La.), 20 So. Rep. 664; Brunswick, etc., R. Co. *v.* Waycross (Ga.), 17 S. E. Rep. 674.

[8] Buffalo *v.* D., L. & W. R. Co. (Sup.), 39 N. Y. Supp. 4.

[9] Oyler *v.* Ross (Neb.), 66 N. W. Rep. 1099.

[10] Wilson *v.* Acree (Tenn. Sup.), 37 S. W. Rep. 90.

[11] Tutwiler *v.* Kendall (Ala.), 21 So. Rep. 332.

CHAPTER XXXVI.

EASEMENTS. RIGHTS OF WAY IN GENERAL.

711. Rights of Way—How Created.—Rights of way are usually created by deed or grant by the owner of the land. In case of an express grant for a consideration it assumes, of course, the regular form, and there is little that can be said about it except in the interpretation of its terms. Rights of way, however, are also frequently created by reservations of certain rights and privileges to the grantor when he parts with his other interests in the property. A reservation, in a deed, of a right of way "over the east lot to and from the wood lot" was held definite in connection with the fact that a natural and well-defined road existed at the time.[1]

Rights of way created by an agreement between a person and his grantor that they will lay out certain streets and highways, and that each party and his grantees are to have free access to, and the use of, such streets or roads, are not easements personal to such person, but are appurtenant to the land which he owns.[2]

A reservation in a deed of "a reasonable right of way across the land" conveyed does not entitle the owner of the dominant estate to inclose a right of way with fences.[3] A contract providing that the several abutting owners who have an easement in a private road shall keep it private and in good repair does not require them to erect fences along the line of the road in front of their respective estates.[4]

If the owner of a tract of land has built a private way over one part of it to another as a means of egress and ingress to and from a public highway, which private way is apparent, continually used, and reasonably necessary to the use and enjoyment of the lands to which it is constructed, and also adds materially to its value, and if he conveys by deeds of the same date the tracts of land in two parts to his two children, one part being that portion of the tract over which the way passes, then the one will take his part subject to

[1] Wells *v.* Tollman (Sup.), 34 N. Y. Supp. 840.
[2] Valentine *v.* Schreiber (Sup.), 38 N. Y. Supp. 417.
[3] Sizer *v.* Quinlan (Wis.), 52 N. W. Rep. 590; Moffitt *v.* Lytle (Pa.), 30 Atl. Rep. 922.
[4] Sachs *v.* Cordes, 11 Ohio Cir. Ct. Rep. 145.

such way as an easement, and the other will enjoy the uninterrupted use of the same.[1]

712. Rights of Way the Subject of a Grant.—An easement of a right of way over land,[2] or of a right to maintain a dam over a portion of the land, is an incumbrance upon the land.[3] It is immaterial that the grantee knew when the deed was made that the dam was so maintained.[4]

A right of way over the land of another is an interest in lands, and can only be created by grant, either by deed or by prescription implying a grant.[5] A deed of "a parcel of land for the purposes of a road" conveys only an easement.[6]

A grant to A and B, their heirs and assigns, of the right to erect, maintain, and enjoy a wharf on land under water belonging to the state, conveys a fee in the land under the wharf.[7]

An agreement between plaintiff and his grantor that they should lay out certain roads along and across their adjoining premises, and that each party thereto should have free and unrestricted right of access to the said roads, is equivalent to an express grant of right of way to plaintiff.[8] An easement cannot be enlarged beyond the terms of the grant.[9]

An instrument which does not describe the land on which the easement is to be imposed is insufficient to create one.[10] If the location and limits of a private way reserved in a deed are not specified, it will be construed to mean a reasonably convenient and suitable way; and parol evidence of the topography of the premises, and of the comparative benefit and injury to each party of routes proposed, is admissible to place the court in the light of the circumstances under which the way was reserved.[11] A burden analogous to an easement, as a right of way, may be created in an estate for a fixed period by the lessee or owner of the estate, and such right of way will be protected by the courts.[12]

A deed giving the grantee a right to erect bathing-houses on abutting land of the grantor, and to enter thereon and to use such houses undisturbed at any time, creates an easement in the grantee over such abutting land.[13]

713. Maintenance of Right of Way over Another's Land.—The owner of land subject to a right of way is not required to keep it in repair,[14] and

[1] Baker *v.* Rice (Ohio), 47 N. E. Rep. 654 [1897]; Meredith *v.* Frank (Ohio), 47 N. E. Rep. 656.

[2] De Roachemont *v.* Boston, etc., R. Co. (N. H.), 15 Atl. Rep. 131 [1888].

[3] Huyck *v.* Andrews (N. Y.), 20 N. E. Rep. 581 [1889].

[4] Huyck *v.* Andrews (N. Y.), 20 N. E. Rep. 581 [1889].

[5] Long *v.* Mayberry (Tenn. Sup.), 36 S. W. Rep. 1040; Mumford *v.* Whitney, 13 Wend. 380 [1836].

[6] Wason *v.* Pilz (Oreg.), 48 Pac. Rep. 701.

[7] Roberts *v.* Brooks (C. C.), 71 Fed. Rep. 914.

[8] Valentine *v.* Schreiber (Sup.), 38 N. Y. Supp. 417.

[9] McCabe *v.* Hood (Cir. Ct.), 1 O. C. D. 292.

[10] Nunnelly *v.* Southern Iron Co. (Tenn.), 29 S. W. Rep. 361.

[11] Gardner *v.* Webster (N. H.), 15 Atl. Rep. 144 [1888].

[12] Newhoff *v.* Mayo (N. J.), 23 Atl. Rep. 265.

[13] Eckert *v.* Peters (N. J. Ch.), 36 Atl. Rep. 491.

[14] Nichols *v.* Peck (Conn.), 39 Atl. Rep. 803 [1898].

whenever an easement is to be enjoyed through artificial means or appliances the owner of the servient estate is not bound to keep such appliances in order unless that duty is imposed by the contract.[1]

A promise by a grantor that the grantee might have a road over the grantor's premises if he fenced such road was held not a dedication of the land covered by the road, though the grantee did fence it.[2] A deed to a person, his heirs and assigns, for the sole purpose of an alley to be used in common with the owners of other property adjoining, conveys only an easement and dedicates the land for use as an alleyway.[3] A reservation in the deed of a right of way over land does not destroy the fee in the grantee, but only burdens the land with an easement of a right of way.[4]

714. Rights of Way Appurtenant to Land.—A deed conveying land expressly bounded by the side of a highway, the fee of which is in the grantor, impliedly grants an easement of light, air, and access in the adjoining half of the highway, of which the grantor cannot, after the road is discontinued, deprive the grantee.[5] The deed need not include any part of the street, and the grantee's right of way in such street is not affected by the fact that its lines are changed, by commissioners afterwards appointed to lay out streets, so that a space is left between the lot-lines and the line of the street established by the commissioners.[6] The grantee has a right to have a street kept open, though it did not previously exist except on maps, and though the grantor, before making the deed, told the grantee that he did not intend to give him the easement.[7]

When land is platted by the owner into lots, blocks, streets, and alleys, and lots are sold by him with reference to the plat, the purchasers acquire a right of way in the streets, etc., and may require them to be kept clear of obstructions as appertaining to the lots.[8]

Where a right of way is granted to a company, which has been purchased and acquired from a grantor, the easement of the right of way is appurtenant to the land, and the company has no right to permit any other parties to use such way.[9]

715. Implied Rights of Way by Necessity.—Implied grants of right of way across land are looked upon with jealousy, construed with strictness, and

[1] Bryn Mawr Hotel Co. *v.* Baldwin, 12 Montg. Co. Law Rep. 145.

[2] Cunningham *v* Hendricks (Wis.), 62 N. W. Rep. 410.

[3] Pellishier *v.* Corker (Cal.), 37 Pac. Rep. 465.

[4] Moffitt *v.* Lytle (Pa.), 30 Atl. Rep. 922.

[5] Holloway *v.* Delano (Sup.), 18 N. Y. Supp. 704; Holloway *v.* Southmayd (N. Y. App.), 34 N. E. Rep. 1047; Barbour *v.* Lyddy (Cir. Ct.), 49 Fed. Rep. 896; Fitzgerald *v.* Barbour (C. C. A.), 55 Fed. Rep. 440.

[6] Nichlas *v.* Keller (Sup.), 41 N. Y. Supp. 172.

[7] Kenyon *v.* Hookway (Sup.), 41 N. Y. Sup. 230, 17 Misc. Rep. 452; Ford *v.* Harris (Ga.), 22 S. E. Rep. 144; Garstang *v.* City of Davenport (Iowa), 59 N. W. Rep. 876; Haight *v.* Littlefield (N. Y. App.), 41 N. E. Rep. 696.

[8] Field *v.* Barling (Ill.), 37 N. E. Rep. 850. *But see* Mahler *v.* Brumder (Wis.), 66 N. W. Rep. 502.

[9] Hoosier Stone Co. *v.* Malott (Ind.), 29 N. E. Rep. 412.

are not favored except in cases of strict necessity.[1] It is not merely a matter of convenience. If the grantor has another mode of access to his land, however inconvenient, he cannot claim a way by implication in the land conveyed, though he may have had the use of a way over it to a public highway at, and a long time before, the conveyance, and of which fact the grantee had notice at the time.[2]

A person who buys land accessible to a public road is not entitled to a way of necessity to another road across other lands of the grantor, although it may be a shorter distance and the first road may be merely a dirt road, while the other is a rock road.[3] No right of way by necessity exists in behalf of land which borders on the sea, over which access to it can be had, the sea being a public way in itself.[4]

When an owner of two adjoining tracts of land has conveyed one of the tracts to another and there is no access to the one which he has kept except over the land so conveyed, a reservation of a right of way will be implied from the necessity of the case.[5] If a grantee has no access to his land except over other lands of the grantor or as an alternative by passing over the lands of a stranger, he has an implied grant of a right of way over the grantor's land as an ineident to the purchaser's occupation and enjoyment.[6] A party who is entitled to a way of necessity over certain land cannot be deprived of his right to it by an offer of a private way over any other lands owned either by himself or others.[7]

A grant of land which has no outlet to the street except over the grantor's lot carries with it, from necessity, a right of way over such lot.[8] There is an implied reservation of a right of way to the grantor and those claiming under him so long as the necessity for the way exists.[9]

A decree establishing in a grantee a way of necessity over his grantor's land is erroneous so far as it adjudges that the way be opened "for public use and travel."[10]

The way implied from necessity is the nearest way or the way most easily accessible to the highway over the grantor's land;[11] but it is confined to the surface of the grantor's adjoining land: it does not include a right of way

[1] Hildreth *v.* Googins (Me.), 39 Atl. Rep. 550 [1898].
[2] Meredith *v.* Frank (Ohio), 47 N. E. Rep. 656 [1897].
[3] Vossen *v.* Dautel (Mo.), 22 S. W. Rep. 734; Field *v.* Mark (Mo.), 28 S. W. Rep. 1004; Lankin *v.* Terwilliger (Oreg.), 29 Pac. Rep. 268.
[4] Hildreth *v.* Googins (Me.), 39 Atl. Rep. 550 [1898]; Kingsley *v.* Goulds-borough Ld. Imp. Co., 86 Me. 279.
[5] Willey *v.* Thwing (Vt.), 34 Atl. Rep. 428; Boyd *v.* Woolwine (W. Va.), 21 S. E. Rep. 1020; Miller *v.* Richards (Ind.), 38 N. E. Rep 854; Pleas *v.* Thomas (Miss.), 22 So. Rep. 820 [1897].
[6] Jones on Easements, § 298.
[7] Ritchey *v.* Welsh (Ind.), 48 N. E. Rep. 1031 [1898]; Palmer *v.* Palmer, 150 N. Y. 139.
[8] Kruegel *v.* Nitschmann (Tex. Civ. App.), 40 S. W. Rep. 68.
[9] Fritz *v.* Tompkins (Sup.), 41 N. Y. Supp. 985.
[10] Kruegel *v.* Nitschmann (Tex. Civ. App.), 40 S. W. Rep. 68.
[11] Osborn *v.* Wise (Eng.), 7 Cor. & P. 761.

under the surface even where an underground way would be much more convenient for the grantee.[1]

Where a party sells two adjoining tracts of land and one can have access to a public highway only by passing over the other of said tracts, it creates a right of way of necessity.[2] If, in settlement of an estate, a farm was conveyed to one heir, excepting a small piece thereof, which was at the same time conveyed to two other heirs for use as a private cemetery, the conveyance carries with it by necessity, and as a part of the grant, a right of way to the cemetery lot over the remaining part of the farm.[3]

A right of way by necessity over the land of another ceases when the necessity ceases, and where there is another way than the one in question it cannot be a way of necessity; yet where the occupants of land have from time out of mind used a way over the land of another, under a claim of right, as a way of convenience merely, and not as a way of necessity, their use of the way cannot be disturbed.[4]

The right of way by necessity is confined to the grantor's lands. The fact that one's land is completely surrrounded by the land of another does not of itself give the former a way by necessity over the land of the latter, where there is no unity of ownership.[5] However, the right of a grantee of the state to a way by necessity has been held not to extend over state lands which entirely surround the grant.[6]

A right of way will be limited to such uses as were contemplated in the grant and such as are a benefit to the land to which the way is appurtenant. A reservation of "a suitable wagon road or crossing" under a tract of land granted to a railroad company for its tracks, "so as to enable grantor to travel and cross freely between his land on each side of the granted premises," does not entitle the grantor's privies of estate to lay therein oil-pipe lines for the conveyance of petroleum, since that is no benefit to the lands to which the way is appurtenant.[7]

There are other ways of necessity or privilege, as when one's property has been cast upon the land of another by Providence or an act of God. In some states and under some circumstances rights of way are given as by necessity as right of ingress and egress by a tenant to gather and market crops which he has planted or to which he may be entitled.[8]

716. Change of Location of Right of Way.—An owner of land subject to an easement of way cannot without the consent of the person having the

[1] Pearne *v.* Coal Creek Min. & Manfg. Co. (Tenn.), 18 S. W. Rep. 402.

[2] Rogerson *v.* Shepherd, 10 S. E. Rep. 632.

[3] Palmer *v.* Palmer, 150 N. Y. 139, 44 N. E. Rep. 966, *reversing* 24 N. Y. Supp. 613.

[4] Benedict *v.* Johnson (Ky.), 42 S. W. Rep. 335 [1897].

[5] Ellis *v.* Blue Mt. Forest Ass'n (N. H.), 41 Atl. Rep. 856 [1898].

[6] Pearne *v.* Coal Creek Min. & Manfg. Co. (Tenn.), 18 S. W. Rep. 402.

[7] United States Pipe-line Co. *v.* Delaware, L. & W. R. Co. (N. J.), 41 Atl. Rep. 759 [1898].

[8] Brown *v.* Leath (Tex.), 42 S. W. Rep. 655,—lessee of mortgagor *v.* a purchaser at foreclosure sale.

easement change the location of the way.[1] When the right of way has once been established it is not extinguished by the opening of another way by the owner unless the other party expressly assents to such change.[2] The course of a right of way acquired by prescription is no more subject to variation by parol agreement or by acts and conduct than if created by deed.[3]

Where the owner obstructs the right of way and opens another way instead, which, after some objection by the owner of the right of way, is at last adopted and used by him, only nominal damages can be recovered in the absence of proof of actual damage.[4] Where the parties execute a deed for the declared purpose of changing the location of a right of way, such indenture will not be construed as abridging or enlarging the extent of the easement originally granted unless such purpose clearly appears from the whole instrument.[5]

Under the Georgia code, one who has had a private right of way over another's land for two years and another right of way for five years, and has at the owner's request abandoned the first one, he cannot tack possession of the strips so as to claim an easement for seven years by prescription.[6] A prescriptive right of way over another's land cannot be acquired without showing a defined line of travel.[7]

Where a right of way has been used and occupied under a contract and license given to the selectmen of a town by the owner of land, the town cannot acquire a right of way by prescription over the land even though the contract was not authorized by the town. If the selectmen represented that they had authority to enter into the agreement, and license was granted relying upon such representation, no right to the use of such road would be acquired until the owner was notified that the town was not using the right of way by virtue of the license; provided, however, that the town's use of the way was not inconsistent with the agreement, and that the owner believed that the town was using the way in pursuance of the agreement.[8]

A grantee of a way of definite width is not restricted to the mere right of passage over the natural surface of the land within the boundaries of the way, but can construct over the entire width a road suitable for the convenient enjoyment of the grant.[9] Where all the owners of the easement of a way of definite width have constructed through the middle of the way a narrower road of an agreed grade, material, and surface, without stipulating that such road shall not thereafter be widened, a subsequent widening of such road by

[1] Many *v.* Port Reading R. Co. (N. J. Ch.), 33 Atl. Rep. 802.
[2] Palmer *v.* Palmer, 150 N. Y. 139.
[3] Nichols *v.* Peck (Conn.), 39 Atl. Rep. 803 [1898].
[4] Fitzpatrick *v.* Boston & M. R. Co., 84 Me. 33.
[5] Rotch *v.* Livingston (Me.), 40 Atl. Rep. 426 [1898].
[6] Peters *v.* Little (Ga.), 22 S. E. Rep. 44; Totel *v.* Bonneyfoy (Ill.), 14 N. E. Rep. 687 [1888].
[7] Bushy *v.* Santiff (Sup.), 33 N. Y. Supp. 473.
[8] Deerfield *v.* Conn. R. Co. (Mass.), 11 N. E. Rep. 105 [1887].
[9] Rotch *v.* Livingston (Me.), 40 Atl. Rep. 426 [1898].

any easement owner to the full width of the way, with the same grade, material, etc., is a reasonable exercise of his right.[1]

That only a portion of a street which has been dedicated and accepted as a public street is opened up does not divest or impair the right of the public to open and use the remaining parts whenever the exigencies of public travel and wants require it.[2] The traveling public has a right to use every portion of the pavement, and to presume that there are no dangerous impediments unprotected, and that the street is in a reasonably safe condition.[3]

717. Obstructing a Right of Way.—To maintain an action for obstructing a way, actual damages need not be proven, nor is it necessary to prove that the plaintiff wished or attempted to use the way while it was obstructed. Such an action may be maintained without first demanding that the obstruction be removed.[4]

In Pennsylvania, in the absence of special damages equity will not intervene to abate a nuisance arising from the obstruction of a highway.[5]

The owner of the servient tenement has a right to maintain movable bars or a swinging gate in a right of way over his land possessed by another if they do not unreasonably interfere with the enjoyment of the easement. The usual and necessary inconvenience involved in descending from a wagon and opening a gate and closing it after driving through is not an unreasonable obstruction of or a hindrance to the free use of a right of way over land.[6]

Where a right of way had been created and described as the way as then established, which was sixteen feet wide and had been used for a long time and was well marked, it was held that the owner of the servient estate could not build his fences inclosing the path in a straight line so as to change the course of the way. Such a fence was held to be an obstruction of the right of way.[7]

Though an owner of even a fractional part of a way may object to a partial obstruction thereof, he is not entitled to relief in equity where it does not appear that such obstruction interfered with his use of the way.[8]

Where a plaintiff has without serious objection permitted a neighbor to erect a building which encroaches upon his easement in a private way and has for nine years acquiesced in such encroachment together with other parties interested, a court may properly refuse to order the removal of a portion of the building to remove such encroachment.[9]

If an abutting owner set a post on the edge of the highway, though it be

[1] Rotch *v.* Livingston, *supra.*
[2] London & S. F. Bank *v.* Oakland (C. C.), 86 Fed. Rep. 30.
[3] Louth *v.* Thompson (Del.), 39 Atl. Rep. 1100 [1897].
[4] Collins *v.* St. Peters (Vt.), 27 Atl. Rep. 425.
[5] Phila., etc., R. Co. *v.* Phila., etc., Ry. Co., 6 Pa. Dist. Rep. 487.
[6] Kohler *v.* Smith, 3 Super. Ct. (Pa.) 176, 39 W. N. C. 359.
[7] Calvert *v.* Weddle (Ky.), 44 S. W. Rep. 648 [1898].
[8] Bentley *v.* Root (R. I.), 32 Atl. Rep. 918.
[9] Green *v.* Richmond (Mass.), 29 N. E. Rep. 770; Duer *v.* Doherty, 26 Pittsb. Leg. J. (N. S.) 104.

put there to protect the public from an insecure sewer which he had constructed in the street at that point, he is liable to a traveler who is injured by such obstruction.[1]

An owner of land abutting upon a public highway, who has set out a hedge and shade-trees which encroach some five feet within the line of the highway, may have an injunction to restrain a supervisor of roads from removing the shade-trees and hedge if it appear that they do not obstruct the road or prevent its necessary improvement.[2]

A grantor loses the right of way he has reserved over land in common with the grantee when he has been excluded by the grantee by a structure of a permanent character on most of the granted premises and fencing the rest, this being acquiesced in by the grantor.[3]

If a person construct a ditch across a public highway, he is bound to restore the highway at his own expense, and to keep it in good repair whether the ditch cuts the highway or street within or without the city limits. The building of a culvert by an authorized officer in a highway which is traveled more or less and which he has authority to work is sufficient to show an acceptance of such a highway.[4]

718. Erection of Awnings, etc., in a Street.—Frequently in cities there are ordinances prohibiting the erection of awnings and other constructions over or under the sidewalks or other parts of the street. Such ordinances have been held valid and have been upheld by the courts even to the extent of denying a contractor who has erected such an awning the right to recover for his labor and materials.[5]

In some cities the erection of awnings is permitted by license of the city council or board of aldermen; and if an awning be erected without such license and in violation of the ordinances of the city, the fact that the awning does no injury will not prevail if the awning is a purpresture.[6] A city council has not the power to grant any part of a street to any person for a private use to the exclusion of the public, and a permanent structure for a private use upon the street is a nuisance. Authority to a person to erect an awning in a street by a city council is a mere license which may be revoked at any time by the city.[6]

Without express legislative authority a city has not the right or power to grant a right to erect and perpetually maintain awnings, etc., over the sidewalks and the streets, and no lapse of time will render the license to erect

[1] Gunther *v.* Draubauer, 38 Atl. Rep. 33.
[2] Crismon *v.* Deck (Ia.), 51 N. W. Rep. 55.
[3] Botsford *v.* Wallace (Conn.), 37 Atl. Rep. 902.
[4] Devoe *v.* Smeltzer (Ia.), 53 N. W. Rep. 287.
[5] Wait's Engin. and Arch. Jurisp., § 76; Hibbard *v.* Chicago (Ill.), 50 N. E. Rep. 256.
[6] Hibbard *v.* Chicago, *supra*.

such awnings irrevocable.[1] A Delaware case held that abutting property owners have a right to place upon the streets of a city doorsteps, stepping-stones, hitching-posts, and awning-posts, which every one is bound to take notice of at his peril.[2]

719. Easement of Drain over or through Land.—A water-pipe leading from a driven well in the yard to a sink in the kitchen and ending in a pump, by which water is habitually drawn for domestic purposes, the well and pipe being completely hidden from view, forms an apparent and continuous easement which passes with the dwelling when it alone is conveyed by the owner of both the yard and the house.[3] A reservation by the grantor, his heirs or assigns, of the right to use a certain drain across the premises creates an easement of drainage over the land conveyed, which is not nullified because the drain in fact ends in a cesspool on the land.[4]

When a drain is enlarged by joint expense of the dominant and servient estate, this act does not so destroy its identity as to destroy the easement.[5]

One who owns land subject to a right of way over a part thereof may plow that part of the land over which the right of way is located if by so doing he does not interfere with the use of the right of way.[6]

A parol agreement that a party may erect a dam upon the lands of another, not for temporary but for permanent purposes, as for water-power for the use of mills and other hydraulic works, is void, being within the statute of frauds.[7]

720. Bridges a Part of Highway.—Public bridges are usually held to be a part of the highway. The terms are not convertible; therefore an indictment for neglect to repair a bridge must be by the term "bridge" and not "highway." A bridge over a stream crossing a city street is a part of the street.[8]

A bridge constructed by a private corporation whose charter authorizes it to build and maintain a toll-bridge and approaches thereto for public travel and accommodation is, from the time it is open to the public, a portion of the highway, subject only to a right to take tolls for its use.[9]

The approaches to a bridge built by a board of chosen freeholders for the purpose of continuing a highway across a stream, if built within the lines of the highway, is a part of the highway.[10]

721. When Occupation of Public Ways may be Authorized.—City authorities have no right or power to give public property to a private person to inclose and occupy as his own. An interesting case arose in the city of

[1] Augusta *v.* Burum (Ga.), 19 S. E. Rep. 820. *See* Field *v.* Barling (Ill.), 37 N. E. Rep. 850.

[2] Louth *v.* Thompson (Del.), 39 Atl. Rep. 1100 [1897].

[3] Larsen *v.* Peterson (N. J. Ch.), 30 Atl. Rep. 1094; Weber *v.* Miller, 9 Ohio Cir. Ct. Rep. 674.

[4] Jones *v.* Adams (Mass.), 38 N. E. Rep. 437.

[5] Jones *v.* Adams (Mass.), 38 N. E. Rep. 437.

[6] Moffitt *v.* Lytle (Pa. Sup.), 30 Atl. Rep. 922.

[7] Mumford *v.* Whitney, 13 Wend. 380 [1836].

[8] Chicago *v.* Powers, Adm'r., 42 Ill. 169.

[9] Pittsburg, etc., Ry. Co. *v.* Point Bridge Co. (Pa.), 30 Atl. Rep. 511.

[10] Willets Mfg. Co. *v.* Board (N. J.), 40 Atl. Rep. 782.

Troy, N. Y., where the common council passed a resolution the effect of which was that H. Street in that city was reduced to a width of forty feet by taking a strip from the east side of the street and by giving the owner of the adjoining premises permission to inclose this strip within his grounds. This strip was inclosed by a permanent wall in 1853 and so remained until 1874, when the city authorities, under resolution of the common council, revoked the former resolution and directed the opening of the street to its original width. The courts held that the common council had no authority to give the adjoining owner permission to inclose a part of the street for his private use, and that it could not transfer any title or extinguish the public easement in the part of the street so inclosed. It was also held that the easement of the public in the street had not been extinguished by adverse possession, because the adjoining owner had held it under a license and his holding was not, therefore, within the statute of limitations; and this was so held even though the license was invalid. Furthermore, it was held that such an encroachment upon a public highway could not destroy the public right or take away the authority of the public officers to remove it.[1]

Municipal authorities have no power to grant the use of a public highway for the erection of private scales, such purpose not being a public purpose.[2] A building permit, issued by municipal authority, which authorizes the occupation of a part of a public street as a depository for building materials, and requires that proper lights be placed at night to indicate their location, does not relieve the city from the duty of exercising a reasonable diligence to prevent the holders of such a permit from occupying the street in such a way as to endanger passers-by in their proper use of such street.[3]

Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor.[4]

The construction of a bridge on one side of a street over a railroad crossing, and the erection of a wall on the remaining street and sidewalk to prevent a crossing at grade, do not constitute a taking of private property for public use so as to entitle the owner of property abutting on such street outside of, but next to, the wall to recover for damages caused thereby.[5]

A municipal corporation authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river incurs no liability for the damages unavoidably caused to adjoining

[1] St. Vincent Asylum *v.* Troy, 76 N. Y. 111.

[2] Berry-Horn Coal Co. *v.* Scruggs-McClure Coal Co., 62 Mo. App. 93.

[3] Cleveland *v.* King, 132 U. S. 295.

[4] Transportion Co. *v.* Chicago, 99 U. S. 635 [1878]. This was a case of a structure occupying a street and interfering with its use.

[5] Talbot *v.* New York & H. R. Co., 151 N. Y. 155, 45 N. E. Rep. 382.

property by obstructing the street or the river, unless such liability be imposed by statute. If the fee of the street is in the adjoining lot-owners, the state has an easement to adapt the street to easy and safe passage over its entire length and breadth. When making or improving the streets within its limits, in the exercise of an authority conferred by statute, a city is the agent of the state, and if it acts within that authority, and with due care, despatch, and skill, is not at common law answerable for consequential damages. That which the law authorizes cannot be a nuisance such as to give a common-law right of action.[1]

Under the laws of some states, subject to proper control and police regulation, a railway company may occupy and pass over a street of a city without the consent of the city authorities.[2] *

As the title of one owning land bounded upon a stream not navigable extends, under the common law, to the center of the stream, and as the state cannot take or damage such owner's property so situated without compensation, it follows that the state cannot grant a charter to a railroad company to do the same thing. Therefore if such a company, under its charter, erects a bridge across such a stream, and the property of another bounded by the stream is either taken or damaged thereby, a right of action exists in his favor; but such party can only recover for damages which are special to his property and not for such as are identical to and shared by the public at large.[3] Where the erection of a railroad bridge across a river in a city causes a permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes, such injury is a proper element of damages in a suit by the owner against the company, and it is proper to allow the lot-owner to show such damages by proving the value of his property before the erection of the bridge and its value after, or, in other words, to prove how much less the property would sell for in consequence of the building of the bridge.[3]

The measure of damages to abutting property caused by the construction of a railroad in a public street is the depreciation of the market value of the property.[4]

Where railroad companies which had rightfully maintained a railroad in a street in front of plaintiff's premises were, in consequence of certain river improvements, required by act of Congress to replace their bridge over said river by a higher bridge, thus necessitating building an elevated railway structure in front of plaintiff's premises, which was provided for by state legislation placing the matter under the supervision of certain public authorities, it was held that the companies were liable to make compensation for injuries

[1] Transportation Co. *v.* Chicago, 99 U. S. 635 [1878].

[2] State *v.* Davenport, etc., R. Co., 47 Iowa 507 [1877].

[3] Chicago & P. R. Co. *v.* Stein, 75 Ill. 41 [1874].

[4] Stewart *v.* Ohio River R. Co. (W. Va.), 18 S. E. Rep. 604.

* *See* Secs. 756-770, *infra*.

inflicted on plaintiff's property by reason of these changes in so far as they involved an inconsistent and excessive street use over and above the user which the companies had theretofore had in the street.[1] Where work is done by a railroad company in a street under authority from the city, the company and not the city is liable to lot-owners for injuries to their lots, and the fact that city officers supervised the work is immaterial.[2]

One who has a perpetual easement in one-half of an alley for the use of its surface and the light and air above, and owns the title to the other half, is entitled to compensation from a railway company that has built its elevated tracks over and placed the pillars on the half of the alley, and projected the superstructure over the entire portion of such half and a portion of the other half. Such construction constitutes a taking of property to the extent of the projection.[3]

Where a complaint alleged that plaintiff owned the fee in certain land, subject to an easement for street purposes; that, without his consent, one of the defendants had built, and both were maintaining, a bridge and railroad thereon, and just north of other land owned by plaintiff adjoining thereto; that by so doing defendants were guilty of continuous trespass on plaintiff's land; that to recover therefor would require a multiplicity of suits, and that plaintiff had no adequate remedy at law, it was held that the complaint stated facts authorizing an injunction.[4]

In New Jersey it has been held that where an abutting owner owns the soil in the street upon which his house is built he is entitled to bring an action against a railroad company for building a depot in the street in front of his land, and that suit should be brought in his own name; that the fact of his owning lands bounded upon the street raises a presumption that he owns the fee to the center of the street; and that while an individual cannot maintain a suit to restrain a nuisance where he is injured only in such rights as are enjoyed by him as one of the public, even though he is inconvenienced more than other individual members of the community by the nuisance, yet in such a case he can bring suit in his own name without an information being filed for the public in the name of the attorney-general on behalf of the state.[5]

[1] Salazar *v.* New York & H. R. Co. (N. Y. Sup.), 49 N. Y. Supp. 1065 [1897].
[2] Jordan *v.* City of Benwood (W. Va.), 26 S. E. Rep. 266.
[3] Metropolitan W. S. El. R. Co. *v.* Springer, 171 Ill. 170 [1897].
[4] Coatsworth *v.* Lehigh Val. Ry. Co., 48 N. Y. Supp. 511.
[5] Higbee *v.* Camden, etc., Co., 19 N. J. Eq. 276 [1868].

CHAPTER XXXVII.

RIGHT OF WAY OF RAILROAD.

731. Character of Railroad Right of Way.—A right of way is a right held by a railroad company for railroad purposes in the land over which its road is built. It sometimes denotes the land itself. The rights which a railroad may have in the land over which its right of way passes depend upon the manner in which the right of way was acquired, whether by purchase, or by grant, or by the exercise of the power of eminent domain. If acquired by purchase or grant, they will be determined by the terms of the deed; if by eminent domain (unless specially provided for otherwise by statute), the road has only an easement, the fee remaining in the original landowner.

The property which a railroad takes in its right of way is usually determined by the charter or legislative act giving it the power of eminent domain.[1] It is competent for the state to appropriate the fee for the use of a railroad upon payment of proper compensation. The legislature is the sole judge as to what extent the owner's title should be extinguished for the public use.. The constitution of the state of Illinois forbids the condemnation of lands for railroad right of way except to the extent of an easement. If not specified in the grant or deed, the interest in a railroad right of way is the same whether granted or condemned.[1] It is usually an easement in the land of others. As such it is an incumbrance upon land and may constitute a breach of covenant against incumbrances contained in the deed. The covenant is not released by knowledge of both parties of the easement of a railroad company.[2] When the charter provides that the company shall be seized and possessed of the land, etc., it gives only the right of way, a power to acquire lands for its own corporate purposes, and gives only such an estate as is necessary for the uses of the railroad; and in general a railroad company has no authority whatever to use its right of way acquired by condemnation proceedings for any other purpose than that connected with the proper construction, maintenance, and operation of its road.[3] It has been held, therefore, that a road has no right to take ice from a pond on its way;[4] nor to cut the grass growing thereon;

[1] Smith *v.* Hall (Ia.), 72 N. W. Rep. 427 [1897].

[2] 19 Amer. & Eng. Ency. Law 839, *and cases cited.*

[3] 19 Amer. & Eng. Ency. Law 840.

[4] Julien *v.* Woodsmall, 82 Ind. 568.

nor to take sand for building a round-house;[1] nor to sell materials removed while grading the road, though it may sell the road itself;[2] nor to build structures, machinery, etc., upon its way which are not necessary to the exercise of the franchise.[3] However, the occupancy of a right of way by a railroad is practically exclusive, and the owner of the servient estate can cultivate it only by the company's consent.[4]

Grants and charters of railroad companies are in the nature of public franchises, and are for the public weal, and will receive a reasonable interpretation, due regard being had to the magnitude, character, and general public utility of the enterprise.

The term "right of way" has been held to embrace the land used as a way for the road, and not such other grants as might be used for the convenience of the railroad, but not as a part of its way.[5] It usually includes lands required for necessary side-tracks and turn-outs, and the improvements thereon.[6] It is sometimes used to designate a mere right of crossing, but in its application to a railroad company it is used to describe a strip of land which the company appropriates for its roadbed.[7]

A right of way for all purposes connected with the construction, use, and occupation of a railway has been held not to give the right to take sand from the way for use in building a round-house.[8]

A railroad bridge becomes a part of the permanent structure of a railroad, so much so that a mechanic's lien cannot be maintained for work performed and material furnished for a bridge, as against liens created by prior mortgages on the railroad.[9]

732. Right of Way—How Acquired.—A legal right of way may be acquired in three ways: (1) by deed or patent; (2) by condemnation proceedings and payment of damages; (3) by prescription.* If a railroad company enters upon land over which it has not acquired a right of way, it is a trespasser, and an action of ejectment or a suit for damages may be maintained. The fact that a railroad company was permitted to enter and build its road does not give it a right of way by estoppel. The owner may maintain an action for damages, though he might be prevented from maintaining an action of ejectment. When a company has secured the fee in the lands over which its road is built, it has all the property rights of a natural person, and therefore an exclusive right to its possession and enjoyment. In such case

[1] Vermilye *v.* Chicago, etc., R. Co., 66 Ia. 606.
[2] Aldrich *v.* Drury, 8 R. I. 554.
[3] Lance's Appeal, 55 Pa. St. 16.
[4] Paxton *v.* Yazoo & M. V. R. Co. (Miss.), 24 So. Rep. 536 [1899].
[5] Chicago Railroad Co. *v.* Paddock, 75 Ill. 616; Mercantile Trust Co. *v.* Atlantic & Pac. R. Co. (C. C.), 63 Fed. Rep. 910. *See* Pinkum *v.* Eau Claire (Wis.), 51 N. W. Rep. 550.
[6] Pfaff *v.* Terre Haute, etc., R. Co., 106 Ind. 144.
[7] Keener *v.* Union Pac. R. Co., 31 Fed. Rep. 128.
[8] Vermilye *v.* Chicago, etc., R. Co., 66 Ia. 606.
[9] Cleveland C. & S. Ry. Co. *v.* Knickerbocker Trust Co. of New York, 86 Fed. Rep. 73.

* See Sec. 685, *supra*.

neither the original owner nor the public authorities have any right to build below or above the railroad, as when it runs through a tunnel.[1] Having acquired the fee the company may alienate the title. It may build upon the land even though there are statutes prohibiting buildings on the right of way. In short, the company enjoys the same right to exclusive possession as an individual who owns the fee. If the right of way obtained by purchase or otherwise be defective, and if the road be built and in operation, the act of building and operating does not prevent title by condemnation proceedings.[2]

A deed which conveys "the right of way for a railroad, . . . and described as follows: 'A strip of land forty feet wide, . . . and being nine hundred and fifty-two feet in length,'" though in the usual form of a full warranty deed, conveys an easement only, and not a fee.[3] A deed of railroad land "reserving and excepting" a strip four hundred feet wide, to be used for a right of way or other railroad purposes, in case the line of said road, or any of its branches shall be located on or over the same, does not operate as an exception of the strip from the grant, but merely as a reservation of a right of way or easement in the land, and the title to the whole tract vests in the grantee by virtue of the deed.[4]

The ownership of a right of way is in the railroad company and not in the owner of all its stocks and bonds. The latter may not maintain an action in relation to the right of way.[5] A corporation created only for a limited time may acquire the fee for its right of way.

733. Right of Way Secured by Purchase.—A railroad company may acquire its right of way by other means than by the assistance of the government. It may by purchase from the landowner acquire all the rights necessary to its operation. In some states the refusal of a landowner to sell for a reasonable price is a necessary condition precedent to condemnation proceedings. In some states foreign railroads will not be permitted to acquire a right of way either by condemnation or by purchase.[6]

The power to purchase land necessary to carry out the objects of a corporation is always considered to be authorized unless such powers are specially restrained by the charter or by statutory law. A right secured by purchase carries with it the same rights, privileges, and exemptions which attach when the right of way is secured by eminent domain.

Generally, all the obligations, duties, rights, and privileges which are incident to the right of way obtained by condemnation proceedings are acquired by a railroad company when it purchases its right of way and takes a deed therefor. The same obligations exist as to fencing the line and as to

[1] Junction R. Co. *v.* Boyd, 8 Phila. (Pa.) 224. *And see* Kellogg *v.* Malin, 50 Mo. 496.
[2] 19 Amer. & Eng. Ency. Law 844, 845.
[3] Jones *v.* Van Bochove (Mich.), 61 N. W. Rep. 342.
[4] Biles *v.* Tacoma, O. & G. H. R. Co. (Wash.), 32 Pac. Rep. 211.
[5] Fitzgerald *v.* Mo. & Pac. R. Co., 35 Fed. Rep. 812.
[6] 19 Amer. & Eng. Ency. Law 842.

the construction of its road and the necessary culverts, embankments, etc., and liability for damages due to negligent construction. Also the same privileges exist, such as the right to cast smoke, cinders, etc., upon other parts of the way, the removal of timber and other obstructions, the right to lay side-tracks, and all other rights which by implication are necessary to the enjoyment of the right of way.[1]

734. Grantor of Right of Way.—If one convey a right of way, he should be the owner of a fee. A mere equitable owner of an undivided interest in a possible reversion, or the holder of a contingent interest, has no power to create a right of way. Attempts by the husband to grant rights of way without the co-operation of the wife, and *vice versa*, and where there are dower and homestead interests, require care and advice in regard to the law in the state or jurisdiction in which the conveyance is undertaken. Without doubt, if it may be done, a husband or wife should join one with the other in executing such deeds for right of way. It has been held that a life-tenant can grant a right of way during his life. A tenant for a term of years is the owner of the leased premises during the time of his tenancy. If a railroad company enter upon leased premises under authority from the landowner, it is a trespass, and he is liable to the tenants for damage to his rights, crops, etc.

735. Right of Way on Condition.—Rights of way are frequently granted upon a condition that certain things shall be done either precedent or subsequent to the conveyance. In such cases, if the conveyance be subject to a condition precedent, as that certain structures shall be erected or certain improvements made, the title to the land may be defeated by failure to comply with such conditions.[2] If, however, the conditions named be illegal, a reconveyance of the premises will not be decreed on account of a violation of them. Whether a condition is precedent or subsequent to a vesting of title will depend upon the intention of the parties, and that intention is to be gathered from the terms of the conveyance and the nature of the whole transaction.

If the performance of a condition does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition will be considered as subsequent. The law favors conditions subsequent rather than precedent in all cases of doubt. For that reason, if a condition may be either a condition subsequent or a covenant, it will be treated as a covenant, and whether or not a covenant runs with the land will depend upon its character and upon well-known rules. Very frequent covenants in deeds of right of way for a railroad are those concerning the location and erection of depots, buildings, fences, cattle-guards, and other structures. Such stipulations, in the absence of a clear and express condition, are construed as mere covenants for a breach of which the grantor may have a remedy in damages or a suit in equity for specific performance.[3]

[1] 19 Amer. & Eng. Ency. Law 842, 843.
[2] 19 Amer. & Eng. Ency. Law 847, 848.
[3] 19 Amer. & Eng. Ency. Law 85[illegible].

Where a right of way was given, but on condition that a depot be located at a certain point, an action for damages for the appropriation of land under false pretences may be sustained when the depot and road have not been located as agreed.[1] A covenant to build a side-track was held to have been performed by the construction of a double main track.[2]

If the condition precedent of a deed transferring a right of way be not performed, the estate does not vest if the deed was placed in escrow to be delivered when a depot should have been erected at a point designated, and if the depot is not erected until a long time afterwards, and then by another company. The first company to whom the deed was made out acquires no title to the land either by deed or by adverse possession.[3]

If a condition subsequent be broken, the grantor or his heirs may enter and maintain ejectment against the company, or he may maintain an action for damages or a suit to obtain specific performance. The right of re-entry belongs only to the grantor or his heirs, and not to his assignees.[4] The grantor may avail himself of the failure of the company to perform conditions in a seasonable time, but if he allow the company to continue to make improvements and expenditures permanent in character without protest or objection, he may be estopped from taking advantage of such failure.[5] Thus where a deed of a right of way was given on condition that the company should, within a given time after completing the road, construct fences and cattle-guards, which condition was not performed, and where the grantor did not object when the company made extensive and permanent improvements on the land, it was held that he was estopped from maintaining an action of ejectment after having permitted the improvements to be made, though he might have insisted upon the payment of damages as a condition precedent to the building of the road.[6]

If a landowner permit a railroad company to construct its road under an understanding or contract for future payment therefor, he may not maintain either ejectment or trespass against the company after the road is built and put in operation, though the price has not been paid.[7]

Upon the facts shown, these cases would be unfair to the landowner. In the former case cited, the railroad company was not to build fences and cattle-guards until after the road was built, and therefore a breach of the undertaking could not be claimed until after the improvements had been made. In either case the landowner should have damages, if he could not maintain an action of ejectment, unless he was guilty of such laches as would

[1] Hubbard *v.* Kansas City, etc., Co., 63 Mo. 68.

[2] Purington *v.* Northern Ill. R. Co., 46 Ill. 297.

[3] Sioux City Co. *v.* Wilson, 50 Ia. 422.

[4] 19 Amer. & Eng. Ency. Law 852.

[5] Ludlow *v.* New York, etc., R. Co., 12 Barb. (N. Y.) 440; Taylor *v.* Cedar Rapids, etc., R. Co., 25 Ia. 371; Goodin *v.* Cinc., etc., C. Co., 18 Ohio St. 169; Washburn on Real Property (4th ed.) 21.

[6] Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

[7] McAulay *v.* Western Vt. R. Co., 33 Vt. 311.

make it unreasonable for him to recover. If the grant of a right of way be absolute, it will not be defeated by a failure to comply with certain covenants which form the consideration on which the grant was obtained, if no fault be charged. A grant in consideration of one dollar and the further consideration that the company will locate its road on the grantor's land was held not to be a condition, but only a contract.[1]

Where a railroad company succeeds to the right of another person or corporation who has taken without license or process of law the land of an individual for a right of way, and such company continues to use and occupy the land, it must pay to the owner such damages as will fairly compensate him.

The act of a contractor in seizing and using land for the purpose of constructing a railroad thereon cannot be considered as the act of an independent contractor in a case where the company subsequently occupies and uses the land so seized in operating its railroad.[2]

736. Restrictions on Use of Right of Way.—If the deed restricts the time that the land shall be used for railroad purposes, the title reverts to the grantor when it is no longer used for such purposes.[3] No forfeiture can be claimed in such a case because the land is used for additional purposes, if it be also used for the purpose stipulated.[4]

A deed of land providing that if it be used for other purposes a certain sum shall be paid in addition to the original price, upon which event the title shall be absolute, does not create a qualified or determinable fee, but only a condition subsequent.[5] If the conveyance do not restrict the use of the right of way, there will be no reversion in the grantor. If the company be consolidated with or merged into another company, which succeeds to all its rights, franchises, etc., and which continues to operate the road, the right of way does not determine and revert to the landowner at the end of the time for which the original company was chartered.[6]

The use of tracks for the storing of cars is not a use and operation as a railroad, and a conveyance based upon the latter condition is of no further effect when the track is used merely for storing cars.[7]

The loss of a road to a company under a mortgage sale has been held not an abandonment by the company. A railroad company may purchase its right of way, and such contracts are like any other contracts, and in proper cases a specific performance will be decreed. The damages for the breach of such a contract may be recovered, and the measure is the difference between the price agreed upon and that assessed in condemnation proceedings. A

[1] East Line R. Co. *v.* Garrett, 52 Tex. 133.
[2] Bloomfield R. Co. *v.* Grace (Ind.), 13 N. E. Rep. 680 [1887].
[3] State *v.* Brown, 27 N. J. Law 13.
[4] McKelway *v.* Seymour, 29 N. J. Law 221.
[5] Bd. of Ed. *v.* Trustees, etc., 63 Ill. 204.
[6] Miner *v.* N. Y. Cent., etc., R. Co., 123 N. Y. 242.
[7] Hickox *v.* Chicago, etc., R. Co., 78 Mich. 615.

contract to convey a right of way confers no right to enter upon the land against the owner's will. If entry be opposed, the company may resort to equitable remedies to obtain possession of title. If there be a breach of contract by a company, a landowner has a remedy in an action for damages. If the company fail to comply with the provisions of its contract, the landowner may have a lien on the portion of the roadway which the contract covers. A contract for the exclusive right of way of a railroad has been held contrary to the policy of the law and will not be upheld.[1]

737. Rights of Way by Condemnation.—The method of acquiring a right of way by condemnation or by power of eminent domain is purely a statutory process given by the sovereign power of the state through its legislature. It may differ in the different states not only as to the ceremonies to be observed, but also as to the powers granted. In every case the statute must be followed strictly not only in the form and manner of making the application, but as to all the preliminaries required by the act.*

738. Railroad Right of Way Acquired by Dedication and Prescription.† —A railroad right of way may be acquired, it seems, by dedication, but it must be shown that the occupation or use was with the knowledge and acquiescence of the landowner for the full period of time fixed by the law of prescription or the statute of limitations. When a plat was executed and put upon record explaining a railroad track and the words "depot of O. & P. Railroad," it was held not to constitute a dedication of a lot to a railroad company or to the public use.[2]

A permit by a landowner to a railroad company to build upon his land without charge on condition that it should construct ditches to carry off the water was held to constitute a dedication of the water, and that the owner could not declare the permit forfeited because the company failed to construct proper ditches.‡

739. Widths of the Right of Way.—The width of a right of way which may be acquired by a railroad or other company by the exercise of its right of eminent domain is usually fixed by statute. Proceedings in which more land has been condemned than was authorized by the legislature have been set aside entirely.[3] If a company seeks to condemn a right of way of greater width than the statute has authorized, the necessity for such greater width must be proven by the company who seeks to condemn it.[4]

If the right of way be purchased, its width will be determined by the terms of the conveyance, and there seems to be no limit to the area which may be acquired except when the limit is fixed by the charter powers to acquire lands.

[1] 19 Amer. & Eng. Ency. Law 858.
[2] Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514; Daniels *v.* Chicago, etc., R. Co., 35 Ia. 129.
[3] State *v.* Hudson, etc., R. Co., 46 N. J. Law 289.
[4] Wisconsin Cent. R. Co. *v.* Cornell Univ., 52 Wis. 537; Childs *v.* Cent. R. Co., 33 N. J. Law 323.

* *See* Secs. 825, 864, *infra.* † *See* Secs. 683–686, *supra.* ‡ *See* Secs. 701–710, *supra.*

In the absence of a specific description as to the width, it will be presumed that the company may take the same width as is allowed by charter or statute under which the road is built.[1]

740. Rights of Way by License—Implied Grants.*—A landowner may authorize entry upon his land for the purpose of constructing a line of railroad, or other way, or a telegraph line, or a gas-, oil-, or water-conduit, by a mere parol license, and until it is revoked this license affords to the grantee the same protection which he or it would enjoy under a deed or after the regular condemnation proceedings. When a person consents that a company engaged in the construction of such lines may pass through his land, it is no trespass for such company to enter for the purpose mentioned.[2]

Such a license to do a particular act or series of acts upon another's land is an authority which does not create any estate in the land.[3] It is simply a privilege to be exercised upon the land, and therefore the statute of frauds is held not to apply in such cases.[4] Such a parol license would therefore be void as a grant of an easement or incorporeal hereditament.[5]

A license to a railroad company to enter and lay its tracks gives the company permission to occupy the full width of the right of way authorized by law.[6] A railroad company which constructs and operates its road by license of a landowner is liable for negligence in the operation of its road, as for injury to cattle.[7]

741. Revocable Character of License.*—Such a license is revocable, and cannot protect a company from an entry by the landowner.[8] Generally a license is revocable at the will of the licensor. Especially is this true in cases where it was granted in ignorance or under a misrepresentation of the effect of its exercise.[9] When a railroad company has entered upon land under a license from the owner, and constructed its road, it has been held that it cannot plead such license to an action for trespass for running its trains over said land after the license has been revoked. The right of way is such an interest in the land as cannot be acquired by license, but only in the manner provided by the statute, that is, by deed duly executed and recorded.[10]

A license may be revoked by a subsequent as well as an original owner,[11]

[1] 19 Amer. & Eng. Ency. Law 861.

[2] Louisville, etc., R. Co. *v.* Thompson (Ky.), 18 B. Mon. 735.

[3] Cook *v.* Sterns, 11 Mass. 533.

[4] Houston *v.* Laffee, 46 N. H. 507; Mumford *v.* Whiting (N. Y.), 15 Wend. 380; Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483.

[5] Fort *v.* New Haven, etc., Co., 23 Conn. 214; Pierce on Railroads 131; 8 Amer. & Eng. Ency. Law 694.

[6] Hargiss *v.* Kansas City, etc., R. Co., 100 Mo. 210; Campbell *v.* Indianapolis, etc., Co., 110 Ind. 490.

[7] Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434.

[8] Eggleston *v.* N. Y., etc., R. Co., 35 Barb. (N. Y.) 162. *See* Murdock *v.* Prospect Park R. Co., 73 N. Y. 579, as to what constitutes a parol license.

[9] 19 Amer. & Eng. Ency. Law 859.

[10] Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319; Hayes *v.* Richardson, 1 Gill & J. (Md.), 366.

[11] Foot *v.* New Haven, etc., Co., 23 Conn. 214.

* *See* Secs. 661–670, *supra*.

unless such subsequent owner had notice of the license.[1]

The courts have distinguished between an executory license and one that is executed. The former, which has been created by parol, is revocable at the will of the licensor. In some jurisdictions, after a license has been executed, money expended, as when improvements have been made, and the parties cannot be put *in statu quo*, then the license may not be revoked, and any attempt to revoke it will be enjoined by a court of equity. The decisions do not agree as to their policy in regard to the revocation of licenses, such as arise in construction work. There seems to be a hopeless conflict, and the best impressions will be obtained from cases decided. A number have been given heretofore.*

If the license be to do a single act, it will be irrevocable after the act is done, doubtless upon the ground that the act performed is frequently of such a nature that it may not be undone. Licenses to do a particular act do not in any degree touch upon the policy of the law which requires that bargains respecting the titles of things in real estate shall be in deed or in writing. There can be nothing more than an excuse for the act, which would otherwise be a trespass.[2]

A parol license to enter and connect the tracks of railroad companies[3] is revocable even though valuable improvements have been made. A permit to build a railroad over land was held not to have been revoked by the fact that an agent of the owner from time to time claimed that the railroad company were trespassers.[4] Some of these cases are based upon the presumption that when a man assents to the doing of an act his consent is contingent upon its being done so as not to injure him.[5]

Permission to build a road on one's land implies authority to use it afterwards; and when a landowner allows the construction of the road on his land, he is chargeable with knowledge that the road is of such a permanent character that it cannot be well removed or abandoned.[6] One who has permitted a railroad company to enter upon his land and construct its roadbed, track, etc., has waived his remedy by injunction or action for the trespass, and is confined to the statutory mode of obtaining compensation.[7]

An owner who has not insisted on payment as a condition precedent to the surrender of his land, nor attempted to impede the progress of the road-making, thus inducing a railroad company to expend large sums therein, cannot maintain ejectment on the ground of failure to prepay.[8] The owner

[1] Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490; Masterson *v.* West End R. Co., 72 Mo. 342.

[2] Cook *v.* Stearns, 11 Mass. 536.

[3] Richmond, etc., R. Co. *v.* Durham, 104 N. C. 658.

[4] Harlow *v.* Marquette, etc., R. Co., 31 Mich. 346.

[5] Bankhardt *v.* Houghton, 27 Beav. 425; Woods Railway Law 611.

[6] Harlow *v.* Marquette, etc., R. Co., 41 Mich. 336.

[7] Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178; Cassidy *v.* Chicago, etc., R. Co., 70 Wis. 441.

[8] Provolt *v.* Chicago, etc., R. Co., 57 Mo. 256; McAulay *v.* Western Vt. R. Co., 33 Vt. 311.

* *See* Secs. 661–670, *supra*.

is confined to an action for damages, or a suit for specific performance.[1]

742. Obstructions to the Right of Way.—A railroad company may cut and trim trees or a hedge whose branches extend over its right of way.[2] A suit will lie at the instance of a railway company for the removal of timber standing in such proximity to its right of way as to endanger the safety of passengers.[3] There can be no doubt as to these rights when the railroad company owns the fee of its right of way; and this is also true when it has only a right of way, if the trimming of trees and hedge is desirable for the better protection and operation of the railroad, as when they occasion dampness or obstruct the view.

A railroad company is not bound to remove from its right of way a natural growth of trees which shade and injure the crops upon the land of an adjoining owner, and also sap such land of its fertility, it not appearing that the roots or branches of the trees penetrate or overhang said land.[4]

Whenever property is needed by a railroad company to increase the safety of its roadbed at points where it is unsafe at a particular time of the year, a legal necessity arises for condemning the property.[5]

743. Location of Railroad.—By the act of incorporation of a railroad the powers of the company to locate the route or to locate the railroad are defined in diverse ways which may be classified under four headings, viz.: (1) where the exact location of a railroad is prescribed by the charter or ordinance, as in street railways; (2) where only the termini and general route are prescribed, the details being left to the discretion of the company; (3) where the determination of the general and particular location is left entirely to the company, subject, however, to the approval of certain public authorities.

When discretion is allowed it must not be abused, and cannot be exercised to build a road which differs entirely from that intended by the charter. The exercise of the discretion granted will not be disturbed unless it is a plain case of abuse or error. When it has been once exercised the power is exhausted, and the location may not be changed without specific legislative authority. The authority of a company to make changes will be construed strictly. The rule, however, has not always been strictly enforced. It has been modified and restricted and in some cases even denied.[6]

744. Elements to Determine the Location of a Railroad.—In determining the location of a railroad many things are to be considered. There is the necessity of keeping strictly within the powers conferred by the charter. A corporation being the creation of the law has no powers whatever except such as are conferred or may be reasonably inferred in order to carry out powers

[1] Provolt *v.* Chicago, etc., R. Co., *supra*. *And see* New Jersey, etc., R. Co. *v.* Van Syckle, 37 N. J. Law 496.

[2] Toledo, etc., R. Co. *v.* Green, 67 Ill. 199.

[3] Louisville & N. R. Co. *v.* Johnson (Ky.), 37 S. W. Rep. 844.

[4] Galveston H. & S. A. R. Co. *v.* Spinks (Tex. Civ. App.), 36 S. W. Rep. 780.

[5] Bigelow *v.* Draper (N. D.), 69 N. W. Rep. 570

[6] 19 Amer. & Eng. Ency. Law 826, 827.

bestowed under the charter. Then there are the obligations and relations of the company itself to the stockholders and bondholders. The company owes certain contract obligations to the subscribers to its capital stock, which would be affected if important departure from the location of the road were made. Furthermore, a railroad company is a *quasi*-public corporation and owes to the public certain duties, in the location and operation of the road, which the laws have declared must be respected.

745. Discretion in Selecting a Route Not Definitely Fixed by Charter. —The interpretation of the language of charters in regard to the location of railroads under the several clauses employed is interesting in that it suggests what may be expected in the construction of charters using similar language. A charter to construct a railroad in or near a city, thence to any part of a town, authorizes the road to be located in such manner and time as may be deemed convenient.[1] A general railroad act authorizing changes in the route of railroads was held to be confined to the change of route, not of the termini.[2] Authority to construct a road beginning at a point on Lake Superior in the state of Minnesota or Wisconsin westward to some point on Puget Sound was held to give the company its choice as to a starting-point on Lake Superior.[3]

Railroad charters that do not express anything to the contrary will be taken to allow an exercise of discretion in the location of the route, so far as it is incident to the ordinary, practical problems of surveying and to the nature of the country, etc.[4] If only the two terminal points are designated and there are several routes equally feasible, the most direct will be deemed to have been contemplated; but if there is a difference in the feasibility of the routes, a reasonable discretion will be allowed in the selection.[5] Authority to extend a road fixes one terminus of the same and does not authorize the construction of an independent road.[6]

Authority to build a road by the most direct and least expensive route will not permit a private individual to question the location after the road has been located and built.[7] If the charter does not provide for the location of the road, the company may locate it and its stations at such points as will best serve public interest.[8]

Authority to connect a road with any railroad constructed or to be constructed at any point in the northern boundary of two counties was held not to limit the terminus of the road to some point reached by one of the other roads.[9]

[1] Boston W. P. Co. *v.* Boston, etc., R. Co. (Mass.), 23 Pick. 360.

[2] 19 Amer. & Eng. Ency. Law 926, *and cases cited.*

[3] Northern Pac. Ry. Co. *v.* Doherty (Wis.), 75 N. W. Rep. 1079; Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874].

[4] Southern Minn. R. Co. *v.* Stoddard, 6 Minn. 150.

[5] Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464.

[6] Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601; Bellville R. Co. *v.* Gregory, 15 Ill. 20.

[7] Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 326.

[8] Frankfort, etc., T. Co. *v.* Phila., etc., R. Co., 54 Pa. St. 345.

[9] Com. *v.* Crosscut R. Co., 53 Pa. St. 62.

Where a railroad company has surveyed and marked its line through plaintiff's land and he has conveyed to it a strip of ground "lying along and including the established line of railway to be constructed by said company," the deed refers only to the line as then surveyed, and not to a line that may be thereafter established.[1]

Authority to construct a railroad along a river does not authorize its construction in or upon the river.[2] A mere enumeration of certain places in designating the route of a road does not require it to be located through them in the order named.[3]

746. Discretion must be Honestly Exercised in Locating Road.—In the location of a railroad between points named, the company must have regard for the advantage of the route as a route between the points prescribed, even though the charter specified that the road be built "by such route as a special company shall deem most expedient and advantageous." The interests of the road and the public are to be considered, and not the personal aims and advantage of individuals or of other corporations. An injunction will lie to prevent the abuse of the discretion conferred by the charter.[4]

747. Charter Authorizes but One Location of the Road.—Authority "to enter upon any land to survey, lay down, and construct its road," to appropriate land for "necessary side-tracks and a right of way over adjacent lands sufficient to enable it to construct and repair its road," has been held not to authorize the company to appropriate a temporary right of way to be used as a substitute for the main line while the latter was in course of construction.[5]

When the location has once been decided upon it is usually held to be fixed so that no change of location can be made without a special act of legislature. Even when express authority was given "to vary the route and change the location, after the first selection had been made, whenever a better and cheaper route could be had, or whenever any obstacle to the continuation of said location was found either by difficult construction or by difficulty in procuring a right of way at a reasonable cost," it was held that authority was not conferred upon the corporation to relocate its road after it had been completed, or to take private property for the uses of the road.[6]

After the maps and plans have been filed as required by law and the land has been viewed and damages assessed, the location may not be changed except upon a new petition.[7] The power to lay double tracks is not exhausted by the laying of one track, but may be exercised subsequently.[8]

[1] Owensboro, etc., R. Co. *v.* Barker (Ky.), 37 S. W. Rep. 848.

[2] Stevens *v.* Erie R. Co., 21 N. J. Eq. 259.

[3] Commonwealth *v.* Fitchburg R. Co. (Mass.), 8 Cush. 240.

[4] 19 Amer. & Eng. Ency. Law 827, *and cases cited;* Wait's Engin. & Arch. Jurisp., § 84.

[5] Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228.

[6] Moorhead *v.* Little Miami R. Co., 17 Ohio 340.

[7] Lance's Appeal, 55 Pa. St. 16.

[8] Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; People's Pass. R. Co. *v.* Baldwin (Pa.), 37 Leg. Int. 424.

Authority to construct a railroad from an incorporated city to a certain point where freight and passenger depots are built does not preclude the company from extending its lines to a point beyond where the depots are located.[1]

748. Effect of Change in Location on Subscriptions Paid or Pledged.—When a railroad company has received donations or other assistance from a village or its inhabitants and has engaged to locate its road through certain places and to grant certain privileges in connection with the road, it cannot afterwards change its location without making compensation to such parties.[2] Where subscriptions have been made to secure the location of a road through a certain place, they are invalid if the location be changed. A note given to aid the construction of a road cannot be recovered upon if the road be built upon a different route without the consent of the maker of the note.[3]

749. Exercise of Authority to Change Route of Road.—Authority to change the route of a road does not permit a change of the terminal points.[4] Permission to vary the route and change the location after selection does not permit the relocation of a road and condemnation of land after the road has been built. Power to change the location of tracks on account of difficult construction and other causes should be exercised before the track is built.[5]

The power to change is at an end when the change has once been made.[6] In some cases the power to make changes has been permitted where the company purchased the right of way instead of condemning it by eminent domain.[7] Changes have been permitted by reason of the necessities of the case, when no detriment accrued to the public[8] and before the road is actually built.[9]

750. Power to Change Location Limited to Necessities of Case.—A close study of the cases shows that the right to change a location has not been denied where there was sufficient reason for the change. The court may inquire into the necessities for the change, and if such necessities do not exist, the change will be forbidden in justice to the stockholders of the company and to the public. A railroad company should not be allowed to change its location from motives of caprice or for the sake of private gain or convenience, but it may be expected that changes will be permitted whenever the interests and the convenience of the public are to be subserved, and where the accomplishment of the ends for which the road was built will be realized and a better and more economical location can be selected.[10] Authority of a company to

[1] Appeal of W. Pa. R. Co., 99 Pa. St. 155; Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874].

[2] Chapman *v.* Mad River, etc., Co., 6 Ohio St. 119.

[3] 19 Amer. & Eng. Ency. Law 829.

[4] Atty.-Gen. *v.* West. Wis. R. Co., 36 Wis. 466; Brigham *v.* Agr. Br. R. Co. (Mass.), 1 Allen 316.

[5] Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

[6] Mason *v.* Brooklyn, etc., R. Co. (N. Y.), 35 Barb. 373.

[7] Mine Hill, etc., R. Co. *v.* Lippincott, 86 Pa. St. 486.

[8] Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

[9] Mahasha Co. R. Co. *v.* Des Moines V. R. Co., 28 Ia. 437.

[10] 19 Amer. & Eng. Ency. Law 830, *and many cases cited.*

select lands for its location is exhausted when the time limited in its charter for the completion of the road has expired. A company is not required to place its track in the center of its right of way, but may locate it in its discretion upon any part thereof.

751. Prior Location and Occupation of Right of Way.—Lands already appropriated or taken under public grants for one purpose may not be occupied or taken for other purposes inconsistent with the use to which they have first been put. This is true even though they be not specially excepted from such subsequent grant or appropriation. Land acquired by one railroad company under the right of eminent domain cannot, in absence of express or necessarily implied statutory permission, be taken by another railroad company to which it would be convenient but not necessary.[1]

Where one railroad company, duly authorized, has built its roadbed and obtained its right of way and grounds for station-buildings, machine-shops, side-tracks, etc., through a defile or canyon, the court will grant an injunction in its favor restraining another railroad corporation, authorized to build to the same point, from going upon or interfering with the track or right of way of the corporation first in possession until an adjudgment of rights can be made by the court under the general railroad law of Montana.[2] One railroad corporation is not empowered to be the judge of the necessity of the taking or using the roadbed or right of way built or secured by the other railroad company, but the necessity is a question for decision in the court of the county in which the road is located.[3]

When grants of a definite location are inconsistent one with the other, the earlier one will prevail; and if the selection of the route has been left to the companies, the right to certain lines will be in the company which made the location first. A railroad company is not bound to construct its road or lay its track so as to be the least possible inconvenience to the owner of the land over which the right of way passes.[4]

A prior location prevails, and one company cannot by purchasing the land and proceeding to lay its track deprive of its land another company which had previously surveyed and staked out the line.[5]

Where the conditions and circumstances attending the case are such that but one location can be made, a court of equity may compel the locator and owner of the route to allow another company the use of such location. Such cases arise in ravines or canyons where the cost of constructing a parallel line

[1] Barre R. Co. *v.* Montpelier & W. R. Co. (Vt.), 17 Atl. Rep. 923.

[2] Revised Statutes Montana, p. 461, div. 5, art. 3, c. 15, sec. 309.

[3] Montana Cent. Ry. Co. *v.* Helena & R. M. R. Co. (Mont.), 12 Pac. Rep. 916 [1887].

[4] International, etc., R. Co. *v.* Pope, 62 Tex. 313.

[5] Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 770; Kanawha, etc., R. Co. *v.* Glen Jean, etc., R. Co. (W. Va.), 30 S. E. Rep. 86 [1898]. *And see* Coe *v.* N. J. Mid. R. Co., 31 N. J. Eq. 105. *But see* Joplin & W. Ry. Co. *v.* Kansas City, etc., Ry. Co. (Mo.), 37 S. W. Rep. 540.

would be so great as to forbid it. A third railroad along the Hudson River would be, without doubt, a similar case.[1]

The knowledge that these rights depend upon prior location of the line induces rival companies to great activity to outstrip one another in the location of their lines, and it frequently is the cause of sending surveying parties into the field in midwinter and under the most arduous and expensive conditions. A *survey* followed by occupation for the purpose of building a railroad will determine the location so as to give priority over other companies seeking to appropriate the land covered by it.[2]

The running of "scare-lines" has been held not to constitute such a fraud as will invalidate a settlement with a rival company unless the lines were run where the company had not a legal right to locate its lines.[3] A location before the company was incorporated will not hold as against another corporation making and adopting the same location at a later day.[4]

Where a railroad company has acquired and paid for its right of way and has abandoned it, a second company may acquire it by condemnation; but unless the landowner has refunded the compensation received by him from the first company, he is not entitled to the compensation awarded upon the condemnation by the second company. Such compensation is to be awarded to the first company or its legal representatives.[5]

Where a highway is laid out across a railroad the railroad company is entitled to compensation for the fair value of the land taken, subject to its use for railroad purposes.[6]

752. Maps, Plans, etc., Describing the Location.—Maps, plans, and profiles of the location or survey of road are usually required to be made, verified, and recorded before proceedings for condemnation, etc., can be commenced. When this is done it determines the exact property taken for the location, and constitutes the record of the lands taken. Generally the location is not complete until this description has been filed for registry. Such record is called a description, and is accompanied by maps, plans, and profiles with suitable references. Such record must be so exact and definite as clearly to identify the property taken and to define its precise limits.[7] When ambiguity arises in a description it may be explained after the same manner as other descriptions or by the actual possession by the company.*

Under the laws of New York the map required to be filed by a railroad

[1] 19 Amer. & Eng. Ency. Law 832.

[2] Pierce on Railroads 257; Atchison, etc., R. Co. *v.* Mecklin, 23 Kan. 167; Denver, etc., R. Co. *v.* Cañon City, etc., R. Co., 99 U. S. 463.

[3] Mills Co. *v.* The B. & M. R. Co., 47 Iowa 66.

[4] New Brighton, etc., R. Co. *v.* Pittsburg, etc., R. Co., 105 Pa. St. 13. *But see* N. Y., etc., R. Co. *v.* N. Y., etc., R. Co. (N. Y.), 11 Abb. N. Cas. 386.

[5] Dubuque & Dak. R. Co. *v.* Diehl *et al.*, 64 Iowa. As to what is not an abandonment, *see* Memphis, etc., Ry. Co. *v.* Humphreys (Ark.), 48 S. W. Rep. 86 [1898].

[6] Boston & A. R. Co. *v.* City of Cambridge (Mass.), 34 N. E. Rep. 382.

[7] 19 Amer. & Eng. Ency. Law 833.

* *See* Secs. 541–570, *supra*.

company is sufficient if it shows the alignment and profile. It is not essential that it should show all the connections, turnouts, and switches.[1]

Maps, plans, and profiles filed with a description of a railroad line must be intelligible without the aid of parol evidence, and should be connected with the description of the land.[2] A map filed with the location of a road and referred to as a part of the said location will explain, but not modify or control, a written description of the location.[3] If the location can be fixed by a comparison of the plan and the description, that is enough.[4] *

Where the president of a railroad company filed with the Secretary of the Interior a map showing the proposed route of the road, as provided in the act of incorporation, without authority of the board of directors, and the map was rejected by the Secretary, it is a nullity.[5]

753. Terminals of a Railroad.—The terminals of a road are usually given in the articles of incorporation and in the maps and plans filed with them. A slight defect in such description has been held not fatal to the validity of the articles, as where one terminal was given and the other described as being "at or near B." or as "some convenient point in the county of S., there to connect with" another road. The words "beginning at" or "from" or "between" or "running" to certain places have been held inclusive and to authorize the road to be located within such places.[6]

In case of a road whose terminus was the boundary of the town it was held confined to the town limits at the time when the grant was made, and that it was not extended when the town was enlarged.[7]

754. Property in Location.—The term "location" is used to designate the line over which it is proposed to run the road after such line has been surveyed and fixed upon as the route of the road, but before acquiring the land which it describes. "Locate" has been held to mean to fix or establish the line. It has been held not necessary that the route should have been staked and marked on the ground to fix the liability of subscribers to the stock, and to constitute a location. Location may be completed by resolutions or acts of the directors showing a corporate determination to construct the road over a particular route. The word "locate" is synonymous with the words "laying out."[8]

[1] People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75 [1882].

[2] Portland, etc., R. Co. *v.* York Co., 65 Me. 293; Wilson *v.* Lynn, 119 Mass. 174; Gd. Junc. R. Co. *v.* Middlesex (Mass.), 14 Gray 553; Hunt *v.* Smith, 9 Kan. 137; Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334.

[3] Hazen *v.* Boston, etc., R. Co. (Mass.), 2 Gray 574.

[4] Gd. Junc., etc., R. Co. *v.* Middlesex (Mass.), 14 Gray 553. As to quantity and description in such cases *see* Penn. R. Co. *v.* Bruner, 55 Pa. St. 318; *In re* Park Commrs., 65 N. Y. 131.

[5] Northern Pac. Ry. Co. *v.* Doherty, 75 N. W. Rep. 1079.

[6] 19 Amer. & Eng. Ency. Law 834; Western Union R. Co. *v.* Smith, 75 Ill. 496. *But see, contra*, North Eastern R. Co. *v.* Payne (S. C.), 8 Rich. 177.

[7] Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339; Chope *v.* Detroit, etc., Pk. Rd. Co., 37 Mich. 195.

[8] 19 Amer. & Eng. Ency. Law 835.

* *See* Secs. 541–640, *supra*.

A company has a right, from the beginning, to its location against all except the owners of the land, but it requires condemnation proceedings or purchase of the land to make the location a right of way and to perfect the company's title thereto. The company's right by location is such that it cannot be deprived of such right by the conveyance of the land to a third party or to another company.[1] The right of a company to its location is not lost or impaired by non-user unless the non-user be permanent and entire. It is not lost when a company fails to double-track its right of way for ten years,[2] or to construct its road for thirteen years.[3]

But failure of the company for eleven years to exercise a grant in its charter of an optional circuit over another road was held to defeat the right as against other companies.[4] In case a railroad misuses its right of location the original owner may maintain a writ of entry or some equivalent proceeding.[5] The misuse does not necessarily operate as a forfeiture.

Where a railroad company ceases to use as its right of way land which it had appropriated for that purpose, and leases it to a person who takes exclusive possession, the company thereby abandons its easement, and the land reverts to the original owner free from the easement.[6]

755. Abandonment of Location or Right of Way.—No general law can be laid down as to what will constitute an abandonment or relocation of a road. It will depend upon the circumstances of each case, and is doubtless a question of intention to be determined by the jury.

Abandonment has been presumed when there had been a non-user for ten years, when the right of way had been leased without authority, or when another company had been allowed to occupy and use the location. The mere sale or transfer of the right of way to another company before the road was built was held not an abandonment, especially so long as there was an intention to complete an incompleted part of the road. The failure to run passenger-cars does not operate as an abandonment when the road is regularly hauling freight, and when the company is ready at all times to transport passengers for a reasonable compensation. The erection of a structure for amusement on the land of a railroad has been held not to constitute an abandonment of its right of way.[7]

By abandonment of its location or right of way a company loses all its rights thereto, and the original owners may take possession. The company may remove its depot building when it abandons that part of its road. If a road has failed to occupy one of several routes, it may not complain because

[1] Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 770.

[2] Hestonville, etc., R. Co. *v.* Phila., 89 Pa. St. 210.

[3] Barlow *v.* Chicago, etc., R. Co. 29 Ia. 276.

[4] Girard College, etc., R. Co. *v.* Thirteenth, etc., R. Co., 7 Phila. (Penn.) 620.

[5] Proprietors *v.* Nashua, etc., R. Co., 104 Mass. 1.

[6] Roby *v.* Yates (Sup.), 23 N. Y. Supp. 1108.

[7] 19 Amer. & Eng. Ency. Law 836, *and cases cited.*

it is used by another company. If the whole road or material bought has been abandoned, such abandonment may be made the ground for a forfeiture of the company's corporate rights and franchises. Where a road chartered to operate between two places named is built and operated only part of the way, it may have its charter and its corporate existence annulled by proper proceedings. A location which is illegal may be ratified and made perfect by the legislature, and a defective location has been in some cases reformed by a court of equity.[1]

When easements of right of way are no longer needed by a railroad company it may release them to the owner of the land.[2] The fact that a railroad company has not completed its road within the time limited by its charter does not, as to third persons, affect its title to land acquired for right of way, since only the state can take advantage of the default.[3]

The surveyors of a company may enter upon land for the purpose of examination, preliminary survey, location, etc., without previously acquiring the land, and the statute authorizing such entrance is not invalid as a taking of private property without due process of law or without just compensation.[4] The only compensation to which the owner is entitled is for the injury which is done to his property.[5] *

An act providing for the incorporation of railroad companies, giving to such companies the right to enter on and proceed with the survey and construction of their roads on private land while proceedings for the condemnation of the same are pending, and before the compensation is paid, upon giving security for the damages that may be ascertained, has been held not unconstitutional.[6]

756. Steam Railroads in Streets and Highways.—"Steam railroads in a public street or highway are a source of great inconvenience, annoyance, and danger to the public, and nothing less than a plain and express grant will authorize their construction there. Statutes granting such a right must be strictly construed, and authority to construct a railroad longitudinally in a public highway cannot be implied from a general power to condemn land for a right of way, or from a specific power to construct the road to certain points within the city limits." A steam railroad built in a public street or highway without authority of the law constitutes a nuisance. A court of equity will restrain it, and such damages as result may be recovered. The charter of a

[1] 19 Amer. & Eng. Ency. Law 837, 838.
[2] Flaten *v.* City of Moorhead (Minn.), 59 N. W. Rep. 1044.
[3] Chicago & E. I. R. Co. *v.* Wright (Ill. Sup.), 38 N. E. Rep. 1062.
[4] Polly *v.* Saratoga, etc., R. Co. (N. Y.), 9 Barb. 449; Bloodgood *v.* Mohawk, etc., Co. (N. Y.), 14 Wend. 51; Lyon *v.* Greenbay, etc., R. Co., 42 Wis. 538; Fox *v.* Western Pac. R. Co., 31 Cal. 538; Cushman *v.* Smith, 34 Me. 247; Stewart *v.* Mayor, 7 Md. 515; Walther *v.* Warner, 25 Mo., 289.
[5] Bonaparte *v.* Camden & A. R. Co., Bald. C. C. 205.
[6] Fox *v.* Western Pac. R. Co., 31 Cal. 538 [1867].

* *See* Secs. 351–360, *supra.*

railroad company which authorizes the company to locate its road and take land necessary therefor does not authorize it to occupy a street longitudinally, though it may cross such street.[1] It must not occupy the street to any greater extent than is necessary for the crossing. Authority to locate a railroad upon or through a street must be specifically conferred in clear and express terms or by implication which is clear and unavoidable. If the constitution does not contain provisions to the contrary, the legislature may authorize the use and occupation of one or more highways by a railway company without the consent of local authorities.[2] The legislature has complete and exclusive control of all highways of the state, and it may directly exercise its power of control or it may delegate such power to a municipality. The right to build a railroad in the streets of a city is not dependent on the consent of the city unless the company's charter expressly so provides, but a right of way may be acquired by condemnation proceedings under the legislative enactment as in other cases.[3] A city cannot authorize the construction and operation of a railroad in its streets by reason of its usual and ordinary powers over such streets within its limits. Such authority must have been clearly and explicitly granted to the city by the legislature. It cannot be implied. Such a power may be given to all the municipalities of the state by a general law subject to certain conditions. When a city is given complete and exclusive control over its streets it has been held to be authorized to grant the construction of railroads thereon.[4]

A kinetic motor, operated by steam generated from water heated in a stationary boiler and transferred to a reservoir under the car and the motor, is not the locomotive steam-power contemplated by Laws of New York 1890, c. 565, § 100, providing that a street surface railway may not operate its road by locomotive steam-power.[5]

Where a company is authorized to construct and operate a railroad-track in a street, a court cannot restrict the number of trains to be operated as a condition precedent to the construction of the track.[6]

757. Liability of Municipality for Trongful Acts of Railroad Company.—Where a city has granted authority to a railroad company to occupy the streets with its road, the city itself does not become liable to abutting owners for the injuries caused by such occupation even though the grant was made without authority. The company may not be regarded as an agent of the city in the wrong-doing, and the grant will be presumed to have been made on condition that the company should assume the responsibility for all

[1] Atty.-General *v.* Morris & Essex Ry. Co., 19 N. J. Eq. 386 [1869].

[2] Chicago *v.* Illinois Steel Co., 66 Ill. App. 561.

[3] Millvale, Appeal of (Pa.), 18 Atl. Rep. 993.

[4] 23 Amer. & Eng. Ency. Law 1092–1096, *and cases cited;* Wilkins *v.* Town Council (S. C.), 32 S. E. Rep. 299 [1899]; St. Paul *v.* Chicago, etc., Ry. Co. (Minn.), 63 N. W. Rep. 267.

[5] People *v.* Board of Railroad Com'rs, 52 N. Y. Supp. 908 [1898].

[6] Kentucky & I. Bridge Co. *v.* Kreiger (Ky.), 19 S. W. Rep. 738.

damages caused by its use and occupation of the streets. Unless the wrongful acts are done by direction of the city, it does not become liable for the damages resulting. If the city itself owns the fee of the streets, it has been held to be entitled to compensation for the use of them by the railroad company. In granting authority to construct tracks of a railroad in the streets, a city may exact certain requirements and conditions precedent to its consent, as that the company shall conform to the regulations of the city authorities as to the manner of constructing the track or of operating its trains. Such requirements may not be imposed if the railroad company has express authority from the legislature to occupy the streets without the consent of the city.[1]

758. Railroad Company's Liability.—After a railroad company has acquired a right to construct its road upon the street, it has complete discretion as to the arrangement of matters of detail, such as the exact location of a track, the gauge to be used, and such similar details. In the absence of abuse of such discretion it will not be interfered with by the courts. A grant by the legislature to a railroad company of the right to occupy streets or highways is always subject to a constitutional provision protecting private property, though just compensation shall be made for any property taken or damaged; and such grant cannot be relied upon as affording the company any relief from liability to abutting owners for injuries caused by the use of the streets. This rule was not strictly applied in the earlier cases, some of which held that the use of the streets of a city by a steam railroad was a legitimate and ordinary use of the highway, and that, like street railways, it was merely an improved means of travel which was contemplated when the street was originally laid out, and that therefore no compensation should be allowed to abutting owners for injuries caused by constructing the railroad in the street. This unjust rule has been abandoned and a later and better doctrine adopted in most states—that steam railroads are an additional burden upon a highway, and that the occupation of a street by a railroad is a taking of the property of the owner of the fee of such street. If the company has paid for the right to complete one track along the street, it must pay further compensation when it builds another track, which is held to constitute an additional burden upon the street.[2] *

759. Abutting Owners have Right to Unobstructed Street.—One who purchases a railway located upon the street acquires no rights except those possessed by the original company, and such purchaser becomes liable for injuries to abutting property which arise from the unlawful occupation of the street. The earlier cases held, also, that where the abutting owners did not own the fee of the street, but it was vested in the public or in the city in trust for the public use, no recovery could be had for the occupation of the street

[1] 23 Amer. & Eng. Ency. Law 1098. [2] 23 Amer. & Eng. Ency. Law 1100–1105.

* *See* Sec. 717, *supra.*

by the railroad.[1] Under such ruling it was held that an abutting owner whose title extended over to the middle of the street had no cause of action against a railroad company whose road was built wholly upon the opposite side. In numerous jurisdictions this rule is still recognized and applied. Such a rule could not be based upon well-defined principles of the common law. The rights of private parties in public streets are upheld by the common law.

The weight of later authorities seems to repudiate such a doctrine as unsound. The best decisions of to-day protect an abutting property owner against the appropriation of the street by railroad companies, without regard to whether the fee is owned by him or not. Even if the fee be in the city, county, or state, it is merely held in trust for the public use as a street and for no other purpose; and if the proper use of the street is diverted to any other use, whereby a landowner is deprived of his right of access over the street, then the constitutional provision against the taking of private property without compensation is violated. Upon this ground it has been held that where the state owns the fee of the street its consent that the railway company may use such street merely relieves the company from liability for a public nuisance, but that the company is liable to abutting owners for injuries caused by the construction and operation of the railroad. This law is supported also by the rights of the abutting owner to an easement of access and egress over the street, which rights are pertinent to his property. If these easements are interrupted by the construction and operation of the railroad, damages may be recovered therefor.[2]

The owner of the fee in lands abutting upon or constituting a part of a public country road is entitled to equitable relief for injuries or obstructions of a special or distinct character from those sustained by the general public, arising from the use of any part of it for an unanticipated purpose, and where access to and use of the way are made dangerous or inconvenient by a trespass of a continuing and permanent character.[3]

A railroad company whose road ran across plaintiff's lots and permanently obstructed a public street upon which the property abuts, at a distance of several hundred feet from the premises, was held liable to the owner for the damages sustained by reason of the closing of the street, notwithstanding the condemnation proceedings to condemn the lots for a right of way.[4]

The decided weight of authority of the recent cases, as collected in the American and English Encyclopædia of Law, is in support of this doctrine. The correct rule, as therein declared, is "that whether or not an owner of abutting property is the owner of the fee of the street, he nevertheless has the

[1] Case *v.* Cayuga Co. (Sup.), 34 N. Y. Supp. 595.

[2] 23 Amer. & Eng. Ency. Law 1105–1108.

[3] Philadelphia & T. R. Co. *v.* Philadelphia & B. Pass. Ry. Co. (Com. Pl.), 6 Pa. Dist. R. 269.

[4] Atchison & N. R. Co. *v.* Boerner (Neb.), 51 N. W. Rep. 842; Syracuse S. S. Co. *v.* Rome, etc., R. Co., 67 Hun 161; Wright *v.* Syracuse, etc., Ry. Co. (Sup.), 36 N. Y. Supp. 901.

right to insist that he be not deprived of his rights of light, air, and of access over the street, or materially injured in his use of them; that, since a road constructed along a street is an additional burden thereon and a new use thereof, and the operation of fast and heavy trains with their annoying accompaniments of smoke, cinders, and gases, together with the impediment of free access caused by the track, is a detriment to property, each owner has the right to recover of the railroad company damages for injuries caused by such structure and operation."

Such rights of abutting owners may be assigned to the railroad company or may be expressly or impliedly waived, and in such case the abutting owner has no cause of action except when the company has been guilty of an unlawful or negligent exercise of its authority.

In determining the proper and legitimate use of the street or highway by a railroad company and the general rights of abutting owners to compensation, the ownership of the fee may very properly be considered in determining the amount of damages to be assessed. If the abutter does not own the fee, then he suffers no injury except the interference with his easement of light, air, and access; but if he own the fee, then he suffers in addition the extra burden which is imposed upon his land.

760. Statutes in Regard to Steam Railroads on Streets.—In New York it is held that where the fee of the street is in the public, the legislature may authorize the construction of a steam railroad upon the street, and that the abutting owner has no right of recovery for damages which result from the proper exercise of this lawful authority. If the fee be in the abutting owner, the occupation of the street is considered a taking of property for which such owner may recover. In 1874 a constitutional amendment was adopted which forbids the passage of laws authorizing the construction or operation of a street railroad unless the consent of the owners of one-half the value of the property on the street be first obtained, which constitutional amendment has greatly modified the rule in regard to railroads upon streets and highways in the State of New York. No distinction has been made between street railroads and ordinary steam railroads, the question being whether or not the construction and operation of the road actually interferes with the easements of the abutting owners. The New York courts have refused to apply the same doctrine to surface roads that it has applied to elevated-railway cases, and this has been the subject of adverse comment.[1]

There is no well-settled rule applicable in all the States as to whether damages may be recovered by abutting owners when they do not own the fee of the street. In some States the rule has been modified and secondary considerations, such as the change of the grade of the street or the excessive or unlawful use of the street, have been made the test. In California, Colorado, Connecticut, Arkansas, District of Columbia, Florida, Georgia, Illinois, Missis-

[1] 23 Amer. & Eng. Ency. Law 1112, 1113.

sippi, and Nebraska damages have been allowed the abutting owners, even though they did not own the fee of the street, for the injuries suffered by the use and occupation of the street.[1]

761. Liability for Injury to Abutting Estates.—In some states laws have been passed which give to abutting owners the right to recover damages for all injuries sustained by them in relation to their property by reason of the construction and operation of a railroad upon the streets. In some cases these statute laws merely give the rights which the courts have established in their jurisdictions. Such statutes have been held to give abutting owners the right of recovery even though enacted when the railroad company had completed the construction of its roadbed but had not laid down its tracks. Recovery is limited in such cases to that provided for by the statute. Such laws do not apply to cases where the railroad merely crosses the street.

If, in constructing the railroad, the grade of the street is changed, or embankments are built, or cuts made in the streets, and if such changes interfere with the abutting owner's easement of access to and from his property, then the company is liable as for a taking of private property. In some cases it has been argued that the city has a right to change the grade of its streets without making compensation for injuries suffered, and that therefore it may delegate such right to a railroad company so that the latter can accept its ordinary liability. Such a contention, however, has not been sustained, because in the one case, where the city has the right to change the grades, the damages suffered are for the public benefit, while in the other case the changes are made for the advancement of the interest of a private corporation. The right to occupy a street has been held to convey no authority to alter the grade unless such an authority is specially granted.

762. Measure of Damages to Abutting Property.—The measure of damages to abutting property is the actual diminution in the market value of the premises for any use to which they may reasonably be put. Injuries which are occasioned by the construction and operation of the railroad, and which annoy and damage the plaintiff only in common with the rest of the public, are not to be considered unless the occupation of the street is wrongful and without authority of law. The injury sustained must differ in character as well as in degree from that suffered by the public in general. In determining the injury to its use the same considerations may be regarded as in the sale of such property between private parties. In an action by lessee the only damages recoverable will be the difference between the value of the premises before and after the road is built. Where the abutting owner has no right of recovery except in cases where there has been an abuse or unlawful exercise of authority the measure has been held to be the compensation for the injury suffered, and not to embrace the decreased value of the property. In such case it is not presumed that the wrong will continue, and therefore in an

[1] 23 Amer. & Eng. Ency. Law 1113–1120.

action at law only such damages as have accrued at the time of the action are recoverable.

763. Benefits to Property from Railroads.—The benefits to a part of a tract of land not taken cannot be considered in determining the compensation to be allowed in ordinary proceedings. In several states statutory or constitutional provisions prohibit any considerations of such benefits. However, in cases arising from the occupation of streets by railroad companies these statutory and constitutional provisions have no application. In these cases there is merely an appropriation of easements appurtenant to the land, and the value of these easements can be determined only by estimating the value of the land with or without them. If the interruption of the easement has resulted in an increased value of the land to which they are appurtenant, or if it has not affected the value at all, then the abutting owner has no right to anything more than nominal damages. The rule has therefore been stated to be that in the cases under consideration benefits to abutting land arising from the existence of the railroad *are* to be considered in estimating the damages recoverable by the owner. The abutting owner must show that he has suffered special injury from the occupation of the street. When there has been no appropriation of property, but the only injury is the danger, annoyance, and inconvenience which everybody who uses the streets suffers in the same degree, then the abutting owner has no cause of action. This rule should not be misapplied, for it relates to the right of the plaintiff as one of the general public having a right of passage over the street, and does not apply to his right as owner of the fee or of an easement in the street. Special damages must differ from that sustained by the general public both in degree and in kind, and the abutting owner must establish injuries different in their legal charater from those suffered by the public generally.[1]

An abutting owner must object to the occupation of the street within a reasonable time. If he stand by without objection until the rights of third parties or of the public have intervened, he cannot then maintain an ejectment or insist upon an injunction, though it has been held that he might still maintain an action for damages, his recovery being limited to such damages as had accrued prior to the institution of the action and within the statutory period of limitation, if the injury be of a temporary character; but if the trespass is a permanent one, all damages may be recovered in a single action.

The right of action for damages is, it seems, in the party owning the abutting lot at the time of the occupation of the street, and it does not pass to subsequent purchasers. One who purchases a lot after the road has been constructed is held to take full notice of the rights acquired by the railroad company and of the injury to the property. An abutting owner of two contiguous lots may have damages assessed to both lots together, yet they may not have been so used by the owner in connection with each other. In one

[1] 23 Amer. & Eng. Ency. Law 1123-1128.

case it was held that a recovery for damages to one lot was a bar to an action for similar damages to another lot on the same street when the lots were the property of the same person, but were not contiguous.

764. Injuries to Abutting Owners from Elevated Railways in Streets.—The construction and operation of an elevated railroad is a trespass against abutting property owners, and damages are recoverable by such abutters for any injury or inconvenience whatever which results to them from the structure itself or from uses incidental to it. The smoke and gases and the ashes and cinders from an elevated railroad impair the easement of air to the abutting owner. The structure itself and the passage of cars lessen his easement of light, and the dripping of oil and water and the many columns which support the structure interfere with his convenience of access. They are each and all elements of damage, even though they are a necessary phase of the construction and operation of the road and are not the result of negligence.[1]

Mere noise may be a nuisance, and smoke and vibration of machinery aggravate such nuisance, and the fact that others in the same vicinity are in like manner incommoded is no answer to an action by an injured party.[2]

765. Property Rights may Not be Destroyed or Impaired by Legislative Action.—Direct legislation which would enable the state to take property which was the subject of a grant in a charter of a railroad company or acquired under it would be unconstitutional, and such authority obtained through a reservation would be equally so.[3] Personal and real property acquired during the lawful existence of a corporation, rights of contract or choses in action so acquired, and which in their nature depend upon the general powers conferred by the charter, are not destroyed by repeal, and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power.[4] No act of the legislature can impair the obligation of contracts or establish such rules in regard to the enjoyment and disposition of companies' assets as shall divert them or unfairly and unequally divide them among the creditors.[5] When under a charter certain rights have been acquired and have become vested, no amendment or alteration of the charter can take away the property or the rights which have become vested under a legitimate exercise of the powers granted.[6] Even when the privilege is revocable the benefits received from it before its repeal are vested rights, and the corporation cannot be deprived of them.[7]

[1] Drucker *v.* Manhattan Ry. Co. (N. Y.), 12 N. E. Rep. 568 [1887]; Hine *v.* N. Y. El. R. Co., 36 Hun 293 [1885]. *But see* Matter of N. Y. El. R. Co., 36 Hun 427 [1885].

[2] Curran *v.* McGrath, 67 Ill. App. 566. *But see* Philips *v.* Phila. & R. T. R. Co. (Pa.), 39 Atl. Rep. 298 [1898].

[3] 8 Amer. & Eng. Ency. Law 633.

[4] Greenwood *v.* Freight Co., 105 U. S. 13.

[5] Sinking Fund Cas., 99 U. S. 700.

[6] Commonwealth *v.* Essex Co. (Mass.), 13 Gray 239.

[7] Covington, etc., R. Co. *v.* Kenton Co. Ct. (Ky.), 12 B. Mon. 144; Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395.

CHAPTER XXXVIII.

RIGHTS OF WAY OF STREET RAILWAY.

781. Street Railway Not an Additional Burden upon Streets.—It is pretty well established that the building of a street railway on the streets of a city or village and the running of cars for the transportation of passengers do not constitute an additional burden on the land, but are uses contemplated when the street was located, and that therefore an abutting owner may not maintain an action for damages to his property resulting from the construction and operation of such railway, even though he own the fee of the street, except in cases where he can show that he has suffered some special and material injury.[1]

This doctrine is denied in the state of New York in cases where abutting owners own the fee of the street. The courts of that state have held that "the use of a railroad no matter how it is operated, whether by horse- or steam-power, necessarily includes to a certain extent an exclusive occupation of a certain part of the highway for the tracks of the road and the running of its cars, and the permanent occupation of the soil." It also requires that all other parties stand aside and make way for its progress. This is clearly inconsistent with the legal object and design of a highway, which is entirely free and open to all for the purposes of travel and transportation.[2]

Where a city brought an action to recover compensation it was held that the appropriation of the streets by the legislative authority for the use of a street railway was not a taking of private property which would require compensation to the city, though it owned the fee of the streets. If the exclusive ownership of the streets is in the city, the general rule that abutting owners can have no right to compensation is applied even in New York.[3]

This general doctrine of no compensation cannot be applied so rigidly as to exclude all right to claim damages. If the abutting owner can show that he has suffered some special and material injury in the matter of access to his property, he is entitled to recover compensation. A street railway built solely

[1] 23 Amer. & Eng. Ency. Law 954.

[2] Craig *v.* Rochester City R. Co., 39 N. Y. 404; Story *v.* N. Y. El. R. Co., 90 N. Y. 122.

[3] Kellinger *v.* 42d St. R. Co., 50 N. Y. 206; Kane *v.* N. Y. El. R. Co., 125 N. Y. 186; 23 Amer. & Eng. Ency. Law 956.

for the purpose of transferring freight between two steam railroads was held an additional burden to the street.[1] Embankments raised, or cuts made, or the grade of the street materially changed, may make an additional burden for which compensation to abutting owners will be required.[2]

In Michigan, Massachusetts, and Rhode Island statutory provisions have been made requiring compensation to be made to abutting owners.

782. The Right to Use Streets for Rights of Way.—The right of any company to use the streets of a city for its tracks, pipe-lines, or telegraph and telephone lines is possessed by virtue of its franchise granted by the legislature or of a license from the city, and this right is subject to the limitations of the grant of the franchise or license, and to the inherent rights of the city to control and regulate its streets so far as it may be necessary to preserve them for the free use of the public.[3]

783. Obligation to Keep Street Unobstructed.—A railway company is bound to construct and maintain its road so that the full use of the entire street by the public shall not be materially impaired. If injury result by reason of failure to so construct and repair its tracks, then the company will be held liable for damages suffered. The company, however, is not obliged to keep that part of the street occupied by it in the same state of improvement as the city may keep the remainder of the street. The company shares the burden and expense of improving the highway with the rest of the public.

In many instances, however, the duty is imposed upon the company by its charter or by conditions annexed to the franchise to keep in repair all that part of the street occupied by it, and for a certain distance on each side. Sometimes it is provided that the company shall maintain the whole street. When a railroad company has covenanted with the city as a consideration for its franchise that it will keep the street or any part thereof over which its track passes in repair, it assumes the obligation owing from the city to the public in respect to that part of the street, and is therefore liable for personal injuries arising from defects in such street. In some instances the duty to repair is imposed by ordinances and statutes passed subsequent to the grant of the charter, but the effect of such ordinances and statutes must not be to impair the obligation of the charter contract. Whether or not a requirement by the city as to paving or repairing amounts to an impairment of the obligation of the contract is a question about which the authorities have not laid down an absolute rule, and the same holds true with regard to the exact effect of the reserved right of the legislature or municipality to amend or repeal the charter.

By virtue of the power of police regulation a state may pass ordinances requiring a company to keep in repair a part of the street occupied by it, but such ordinances must be reasonable. When the company is obliged to improve or repair, it has been held that the city should judge of the necessity

[1] Carli *v.* Stillwater St. R. Co., 28 Minn. 373.

[2] 23 Amer. & Eng. Ency. Law 957.

[3] 23 Amer. & Eng. Ency. Law 947.

of repair or improvements in any case. This discretion, however, must be exercised in a reasonable manner.[1]

The usual rules of interpretation are adopted in construing the provisions of the charter or of an ordinance respecting obligations of a street railway company. Since the common-law duty to repair does not require a company to improve the streets, so the provision of its charter requiring it to repair the street does not make it liable for improvements. A company must not only restore the street to the same condition as before the track was laid, but it must maintain the road in such a state that the full use of the highway shall not be interfered with.

If the company fails or refuses to perform its duty to maintain the street or restore it, the city may after due notice cause such repairs to be made and compel the company to pay for them. This remedy is most often pursued. Mandamus may lie to enforce the performance of such duties.

784. Priority in Occupying Streets.—In New York it has been held that the construction of a road in a street gives no exclusive right; that one company cannot prevent another one from first laying its tracks in the street in question; and that if the acts of the other company amount to a public nuisance or an obstruction of the way, it is for the public and not for the other company to complain.

Where there are two or more companies which have a right to lay tracks in a street which can only be occupied by one, the company which in good faith first procures the construction of its road acquires a right of way superior to that of others coming later.[2]

A company must act entirely within the authority of its charter, for it has been held that one authorized to build a cable road only acquires no right by commencing to build a horse- or an electric-road, and that if another company in good faith afterwards begins the construction of a road authorized by its charter, the latter company is entitled to an injunction against the first one.[3]

A bridge over a stream of water, and connecting streets on each side, constitutes a part of the street, and authority to operate a railroad over the bridge is not affected by the destruction of the bridge and the erection of a new one in its place.[4]

785. Rights of Street Railway in Street to the Exclusion of Others.—A street-railway company has been held to have no such exclusive right to the use of its tracks and the ground covered by them as exists in the case of an ordinary company, but it is entitled to use it only in common with others traveling on the highway. Yet it has some rights which are superior to those of other parties. A street-railway company has the right of way over other

[1] 23 Amer. & Eng. Ency. Law 986, 987.
[2] 23 Amer. & Eng. Ency. Law 947; Elliott on Roads and Streets 570.
[3] Indianapolis St. R. Co. *v.* Citizen's St. R. Co., 127 Ind. 369.
[4] Floyd *v.* Rome St. R. Co., 77 Ga. 614. *And see* Pittsburg, etc., R. Co. *v.* Point Bridge Co. (Pa.), 22 Pittsb. L. J. N. S. 367.

vehicles on the street and may require them to turn out and make way for its cars, and it may recover damages for injuries caused by the failure to respect this right. It may by injunction restrain other parties from such a constant use of its tracks as shall materially interfere with the use of its road. At points where a highway crosses the track the rights of the street railway have been held to be in no way superior to those of other parties crossing the highway, and the rights and duties of both parties are governed by the ordinary law of the road.[1]

Under a power reserved to alter, amend, or repeal the charter of a street-railway company the legislature may authorize another company to use its tracks. In some cases it has been held that a city can do so. One company may acquire the right to use the tracks of another by the exercise of the right of eminent domain. In every such case compensation must be made to the company whose tracks are used or condemned, and the method authorized by the legislature must be pursued in determining that compensation. It may not be arbitrarily fixed by the city.

In the absence of authority acquired by the means just mentioned one company has no right to use the tracks of another company without its consent, and may be prevented from doing so by injunction. A law forbidding a street-railway company to lease its rights or franchises to other companies or to operate parallel lines has been held not to preclude such companies from building tracks for the partial use of their respective routes outside of that zone in which they are parallel.

786. Power of Municipal Corporations to Grant a Right of Way.—A municipal corporation holds the control and use of its streets in trust for the public benefit, and unless clearly authorized by a valid legislative enactment it cannot surrender or delegate these rights to private persons or corporations by contract.[2] An ordinance has been declared void which granted to a company a right to construct a street railway for an unlimited period of time and without reserving the power of revocation. Such an ordinance would be void as a delegation of powers which are a public trust, and which in the absence of expressed authority are not alienable.

Such an ordinance differs from a mere license, which is in its nature revocable and subject to the regulation and control of the city. A license and a franchise have been distinguished. A franchise has been held to be a contract which must emanate from the sovereign power of the state, and which cannot be granted by the city unless the power to do so has been clearly and specifically granted. This distinction is made in several leading cases, and the grant of an exclusive right has been held void as being an attempt on the part of the municipality to grant a franchise.[3]

Authority is usually conferred upon cities to grant the use of the streets

[1] 23 Amer. & Eng. Ency. Law 992–998.
[2] 23 Amer. & Eng. Ency. Law 948.
[3] 23 Amer. & Eng. Ency. Law 948, *and* 8 Id. 585.

for purposes of rights of way for public improvements, but such grants must be confined to the reasonable exercise of such a power; and such authority cannot be extended to authorize an individual to construct a private railway across or on the street for his own particular benefit, nor can it grant the use of streets to so many companies that they will be virtually closed to public travel.

If a special authority to the particular company named to occupy certain streets be invalid on constitutional grounds, it is absolutely void and may not be given a general effect so as to inure to the benefit of another company having a prior charter for the streets named.[1]

When a city has merely exceeded its powers in granting its streets to a company, the legislature may confirm its action and render the privilege granted a valid one, but not if the grant was unconstitutional.[2]

When parks, squares, or grounds have been dedicated to the public for purposes of public enjoyment and recreation, neither the legislature nor the city has power to authorize a right of way over them for a street railway. Such a right of way may be granted if such parks and squares belong exclusively to the city.[3] An abutting owner has no such interest in the street as will enable him to enjoin its use for a street railway.[4]

787. Consent of Municipal Authorities to Occupy Streets.—In many states it is necessary to obtain the consent of the city whose streets are to be occupied before the legislature may grant a franchise to construct and operate a street railway. In such cases the consent required is absolutely essential. Such conditions imposed by the constitution upon the legislature do not preclude the legislature from imposing other conditions which are not inconsistent with those stipulated. Therefore, when the consent of the city authorities is necessary, the latter are not limited to merely granting or denying, but they may in their discretion prescribe certain other conditions on which they will give the franchise if such conditions be not repugnant to the grant by the legislature or to the constitutional or statutory provisions on the same general subject.[5] The fact that the company will be subject to great inconvenience and large expense in order to provide the conditions stipulated is not a sufficient excuse for non-performance.[6] A common condition required of companies that desire to occupy the streets is that they shall obtain the consent of the city or the abutting owners, or of both, and that the improvements shall be completed within a specified time. Other conditions imposed and enforced are that the consent of other companies already occupying the street shall be obtained before the new improvements shall be under-

[1] Larimer, etc., St. R. Co. *v.* Larimer St. R. Co., 137 Pa. St. 533.

[2] 23 Amer. & Eng. Ency. Law 950.

[3] 17 Amer. & Eng. Ency. Law 418, *and* 15 Id. 1055; 2 Dill. Munic. Corp., § 650, 651.

[4] Stewart *v.* Chicago G. St. Ry. Co., 58 Ill. App. 446.

[5] 2 Dill. Munic. Corp. (4th ed.), § 706.

[6] St. Joseph Co. *v.* South Bend, etc., R. Co., 118 Ind. 68. *And see* People *v.* Broadway R. Co., 126 N. Y. 29. *See also* People *v.* Chic. W. Div. R. Co., 118 Ill. 113.

taken, or that the property of a certain other company which has a franchise for a like business shall be first purchased or acquired.[1]

The control of all streets and highways is in the legislature, and it is therefore competent for it, in the absence of constitutional restrictions, to authorize the occupation of the streets of the city by a street-railway company without the city's consent.[2] The constitutions of some states, however, require the consent of the municipal authorities, and in other states there are general statutes to the same effect. A subsurface railway wholly within the limits of a city is a street railroad within the meaning of the New York constitution.[3] The laws of New York (Laws 1880, ch. 582) providing that the determination of commissioners may be taken in lieu of the consent of the said city authorities was held unconstitutional. "This provision of the constitution provides that no law shall authorize the construction and operation of a street railway except upon the condition that the consent of the owners of one-half in value of the property be obtained, and that the consent also of the local authorities having the control of that part of the street or highway upon which it is proposed to construct and operate such railroad be first obtained; or, in case the consent of such property owners be not obtained, the general term of the Supreme Court in the district in which the railway is proposed to be constructed may upon application appoint three commissioners who shall determine, after the hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." This provision of the constitution was held not violated by the statute authorizing an existing railroad company to substitute cable-power for horse-power without securing the consent of the local authorities.[4] The consent of local authorities is not necessary to the application for commissioners to determine the expediency of constructing a road.[5]

The local authorities whose consent is necessary under the New York laws (Laws 1884, chap. 252,) are the officers whose duties and powers concern the supervision, maintenance, and care of the highway, and they are the board of highway commissioners of the town.[6]

Where a constitution requires that the consent of property owners or of the local authorities shall be obtained, such requirement is a condition precedent to the right to the use of such streets; and if consent be not secured and the grant confers an exclusive franchise grounded on the condition that the consent of the city be obtained, the legislature is guilty of no violation of the charter by granting the same privilege to another company.[7]

[1] 23 Amer. & Eng. Ency. Law 964, 965.
[2] 23 Amer. & Eng. Ency. Law 965.
[3] *In re* Dist. Ry. Co., 107 N. Y. 42.
[4] *In re* 3d Ave. R. Co., 121 N. Y. 536.
[5] *In re* People's R. Co., 112 N. Y. 578.
[6] *In re* Rochester Electric R. Co., 123 N. Y. 351. *But see* the Railroad Law and the Transportation Corporations Law of New York.
[7] People *v.* Barnard, 110 N. Y. 548.

788. Obligations and Conditions Imposed upon Street-railway Company.—The city itself may make its consent conditional upon a company's undertaking to observe and be subject to all ordinances of the city already in force and thereafter to be passed, provided they are not unreasonable. Cities have required that but one fare should be charged to points beyond their limits;[1] that the company should keep the streets occupied by it clean and in good repair;[2] that the city should receive an annual bonus for the use of the streets;[3] that the roadbed, poles, wire, track, etc., should be approved by the city council. Any condition may be imposed which the city in its discretion may deem proper as the terms upon which its consent shall be given, except such conditions as may be repugnant to the grant of the franchise by the legislature or to constitutional or statutory provisions.[4]

789. Consent Implied, Revoked, or Modified.—If abutting owners stand by and see a street-railway company construct and operate its road under a claim of right, such acquiescence will be regarded as evidence of their consent.[5] When a lapse of ten years and the acquiescence of property owners and the destruction of all written evidence are shown, very slight evidence will be sufficient to establish the fact that consent was obtained as required by statute.[6]

In obtaining the consent of property holders the city is to be regarded as the owner of an open public square which has been dedicated to the public use forever, no matter who holds the fee.[7]

Where a statute requires that the consent of abutting owners shall be obtained before a valid grant of the use of the street may be made, and also that the right to build the road shall be awarded to the party who offers the best terms to the public, it has been held that the *consent* need not in terms be given to the person who is the lowest bidder, for the *contract* can be awarded to him alone, and the *consents*, no matter by whom obtained or by whom given, are in substance essential to the construction and operation of the road in the designated street, and therefore must inure to the benefit of the best bidder.[8]

It has been suggested by good authority that lot-owners might attach reasonable conditions to their consent.[9]

A single-track street railway constructed with the necessary consent of abutting owners may not be double-tracked without securing the consent to such change.[10] But if the original grant was for a double track, the city may

[1] People *v.* Barnard, 110 N. Y. 548.
[2] Pittsburg, etc., R. Co. *v.* Birmingham, 51 Pa. St 41.
[3] Covington St. R. Co. *v.* Covington (Ky.), 9 Bush 127.
[4] 23 Amer. & Eng. Ency. Law 969.
[5] Patterson, etc., R. Co. *v.* Patterson, 24 N. J. Eq. 158.
[6] Chicago City R. Co. *v.* People, 73 Ill. 571.
[7] Patterson, etc., R. Co. *v.* Patterson, 24 N. J. Eq. 158.
[8] State *v.* Bell, 34 Ohio St. 194.
[9] People *v.* Chicago, etc., R. Co., 118 Ill. 113.
[10] Roberts *v.* Easton, 19 Ohio St. 78.

not limit it to a single track after expenditures by the company for construction and equipment.[1]

A property owner's consent to the construction and operation of a cable railway "over, along, and upon" the street does not authorize a material change in the grade of the street.[2] It has been held that property owners might revoke their consents at any time before the city had taken final action.[3]

790. Consent of Abutting Owners or of City.—As a street railway is not usullay considered as creating an additional burden upon the land, the consent of the abutting owners to its construction and operation is not essential unless such consent is required by the constitution or by statute. The constitution or general statutory provisions of many states require that no street railway shall be constructed or operated without the consent of a majority of the abutting landowners. The constitution of the state of New York and the statutes of Illinois and Ohio require that such consent of the property owners shall be obtained before the road is built. Under such a law it has been held that the term "owners" means those who own at least a freehold estate; and such an owner may be represented by life-tenants, and by tenants by courtesy or by a dower, but that a father cannot consent for his daughter, a husband for his wife, tenants in common for one another, guardians for their wards, an administrator for an executor, or a president of a private corporation without the authority of the board of directors, and doubt has been expressed whether or not a city council can act for a municipal corporation.[4]

It has been held that the consent of property owners need not be under seal, though it is required by statute to be in writing.[5]

When the constitution or the laws require that consent of the owners be obtained, such consent is absolutely essential, and the construction of the railroad may be enjoined unless such consent is obtained. It is not enough that the company intends to apply for consent in the hope or expectation of obtaining it. Persons who are not abutting owners, though they are citizens and taxpayers, have no ground of complaint.

When application has been made for an injunction to prevent the construction of a railroad upon a street, the action of the city council in granting permission to construct such railway is not conclusive against property owners, or proof that a majority consent has been obtained.[6]

The city council has been permitted to allow application for consents as to a part only of the route covered by the petition.[7]

[1] Burlington *v.* Burlington St. T. Co., 49 Iowa 144.

[2] Fred *v.* Kansas City Cable Ry. Co., 2 Mo. App. Reptr. 1173.

[3] Bullock *v.* W. Chic., etc., Trans. Co., 23 Chic. L. N. 147; Hayes *v.* Jones, 27 Ohio St. 218.

[4] Booth on Street Railways, *citing* Rapp *v.* City, etc., R. Co., 12 Wkly. L. Bull. 119; Bullock *v.* West Chic. Rap. Trans. R., 23 Chic. L. N. 149.

[5] *In re* Cortland, etc., R. Co., 31 Hun (N. Y.) 72.

[6] 23 Amer. & Eng. Ency. Law 971.

[7] Simmons *v.* Toledo, 5 Ohio C. Ct. 124.

791. Time Limit for Completion of Road.—When a franchise of a street-railway company requires that the road shall be constructed within a specified time, it is a condition subsequent, failing in which the rights of the company are liable to forfeiture. Whether or not the road is substantially constructed, and what constitutes a completed track, are questions of fact for the jury, and it has been held error for the court to instruct the jury that a road was sufficiently constructed "if the ties were laid and the rails placed and spiked thereon."[1]

If the failure to complete the road be due to extrinsic causes and in no way the fault of the company, as by injunctions or by interference on the part of police officers of the city acting under direction of the mayor, the right of the company has been held not to be lost, and the city may be enjoined from interference with the laying of the tracks after the expiration of the time. If the city allow the company to proceed with the work of construction after the expiration of the time without interposing, it may be estopped from claiming a forfeiture.[2]

792. Exclusive Privileges Not in Favor.—Street-railway franchises are never construed to be exclusive if such a construction can be avoided. It is a policy of the law always to discourage monopolies, and the city has not the power to grant exclusive privileges in its streets unless the power has been conferred by the legislature in direct and express terms. It can never exist by implication or construction, and the question has frequently been raised as to the authority to delegate such a power to a municipality. Such questions arise in the construction of a constitutional provision against the creation of monopolies by the legislature. Some cases maintain that the authority depends upon the length of time through which such privilege is to extend, and uphold such power if the length of time be not unreasonable. Exclusive rights over private property may be acquired by contract with the owners, and such rights will be recognized even though afterwards a highway be laid out over the land occupied. There can be no doubt that the legislature has power to grant an individual or a corporation a franchise to construct and operate a street railway within any city, town, or village in the state unless it is expressly prohibited by the constitution. The control of all highways rests in the legislature, and its right in this regard is not impaired by the fact that it had previously delegated the right to control and regulate certain streets to the city.

A street railway is not regarded as an additional burden upon the street, and therefore the legislature's act granting a franchise to a company may be valid though there be no provisions made as to compensation to, or as to obtaining the consent of, the owners of the abutting property.[3]

793. Construction of Street Railways.—Street railways are built and

[1] Houston *v.* Houston, etc., R. Co., 84 Tex. 581.

[2] 23 Amer. & Eng. Ency. Law 975.

[3] 23 Amer. & Eng. Ency. Law 953.

operated upon streets upon the legal presumption that they do not constitute an additional burden and must therefore be so constructed that the use of the highway shall not be interfered with or the rights of the public infringed. The company must build and keep its road to the established grade of the street, and must make it conform to subsequent changes in the street. The method of construction and the materials employed must be of such shapes and forms that when laid they will not prevent the public from making all proper uses of the streets for vehicles. A street-railway company is liable for all injuries resulting as a proximate consequence of its failure to comply with this duty.[1] A street-railway company may not subject the public to inconvenience by laying a heavy rail suitable for steam railroads.[2]

794. Liability for Defective Track and Structures.—The company is not relieved from liability for injuries received by reason of defects in the construction of its track by the fact that it has complied with all the requirements of the ordinances of the city prescribing the manner in which the track shall be constructed, or by the fact that the construction of the road has been examined and approved and accepted by the agent of the city charged with the duty of such examination.[3] The complainant has the burden of proof to show negligence on the part of the company, and if the evidence fails to show that the injury resulted from any neglect of duty on the part of the company, there can be no recovery.[4]

The defects of construction which most often are a cause of injury are those of defective switches or turntables, contracted or expanded cable-slots, broken or improperly hung electric wires, and raised or projecting rails.[5]

There can be no action for damages arising from the proper exercise of a lawful authority, and therefore street-railway companies are not liable for damages necessarily occasioned by the construction of the road.

When the authorities have the power to decide on what streets a railway shall be constructed, the charter of the company under a general law confers simply a corporate existence and does not of itself give any right to the use of any street. To acquire such a right, the consent of the city government must be obtained. If the location be fixed by statute or ordinance, the company may not vary from the lines prescribed, though it seems that a slight deflection may be made, such as a slight departure from the center of the street, in order to reach the company's own property. A material departure from an authorized route is a public nuisance for which the company may be indicted or be enjoined from operating its road.

Where authority to use the street has been conferred and there remains

[1] 23 Amer. & Eng. Ency. Law 978-981.

[2] Com. *v.* Cent. Pass. R. Co., 52 Pa. St. 519. *But see* Millvale *v.* Evergreen R. Co., 131 Pa. St. 1; Easton, etc., *v.* Easton, 133 Pa. St. 505.

[3] Dalzell *v.* Indianapolis, etc., R. Co., 32 Ind. 45.

[4] Eagan *v.* 42d St. R. Co., 19 N. Y. St. Rep. 676. *And see* Nivette *v.* New Orleans, etc., R. Co., 42 La. Ann. 1153.

[5] *See* 23 Amer. & Eng. Ency. Law 979-983, *and cases cited.*

only a *ministerial* duty to be performed by the officers of the city before the street railway can be put in possession, the court may compel the performance of the necessary act by mandamus.

The extension of a street railway may be authorized by the legislature only or its duly empowered agents. If this power has been delegated to the common council of the city, the courts will not interfere with its exercise except in a plain case of fraud or abuse.

Abutters upon public streets in cities are entitled to damages sustained by them by reason of a diversion of the street from the purposes for which it was originally taken and its appropriation to other inconsistent uses.[1] Whatever is utilized for street purposes may occupy a street. Those things that are merely used for municipal purposes and are not for street purposes are an additional burden upon the streets. Street railways are for travel; sewers drain surface-waters of highways; water-pipes supply water to sprinkle and wash streets; electric-light wires or conduits and gas-pipes furnish light for the streets and aid the public in their use. All these are therefore for street purposes, in part at least. With telegraph and telephone wires it is not so. They in no way preserve or improve the streets.[2]

795. Construction of Street-railway Franchises.—In the construction of the charters of a corporation it is a well-established rule that they shall be construed most favorably to the public and strictly against the incorporators. This rule is not carried so far as to defeat the very purpose for which the charter was given, but nothing will be included unless plainly within the scope of its meaning. The grant of an exclusive right to construct and operate horse railways has been held not to include authority to construct and operate a cable road, notwithstanding that at the time of the grant the horse railway was the only street railway in practical use and the latter was practically unknown. A power to make connections with other roads is referred to such roads only as existed at the time of the grant.

A power to construct a road on, over, and along certain streets or alleys has been held not a power to construct the tracks *on the side* of the streets or alleys mentioned. A right to construct and operate a road is authority to construct such switches and turnouts as are necessary for the operation of the road.

It has generally been held that authority to construct and operate a road to a town or place authorizes the construction and operation of such road within that place to its depot, though that be centrally located in the place.[3]

[1] Story *v.* New York El. R. Co., 90 N. Y. 122; Lohr *v.* Met. El. R. Co. (N. Y.), 10 N. E. Rep. 528 [1887]; Wagner *v.* Met. El. R. Co. (N. Y.), 10 N. E. Rep. 535.

[2] Palmer *v.* Larchmont Elec. Co., 158 N. Y. 235.

[3] Mason *v.* Brooklyn St., etc., R. Co., 35 Barb. (N. Y.) 373; Western Pa. R. Co.'s App., 99 Pa. St. 155; Turnpike R. Co. *v.* Coventry, 10 Johns. (N. Y.) 389; McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611. *But see, contra*, Northeastern R. Co. *v.* Payne, 8 Rich. (S. C.) 177.

796. Forfeiture of Street-railway Franchise.—A franchise of a street railway may be lost either by voluntary act of transfer, or by the expiration of the period prescribed for its existence, or from non-user or misuser. The rights of a company may be transferred only when authority has been conferred to do so. If a franchise be granted for a certain period of time, it expires at the end of that period and no judicial proceeding is necessary to declare it at an end. Failure of a city conferring the franchise to fulfill any collateral contract obligations will not prolong its existence.

However, the courts exercise great care in deciding suits whose object is to work the forfeiture of corporate franchises, and not every instance of non-performance of the acts of incorporation or every misuser will forfeit the franchise. The substantial performance according to the intent of the charter is all that will be required.[1]

To work a forfeiture it is necessary to bring direct proceedings against the corporation for that purpose, and the government which created the corporation must institute such proceedings. If, however, the acts of incorporation provide that for the non-performance of certain conditions "corporate existence and power shall cease," or "that this act of the powers, rights, and franchises herein and hereby granted shall be deemed forfeited and terminated," or that "the franchises and privileges herein granted shall truly cease and be forfeited," then the forfeiture is self-executed and requires no action or judicial proceedings to declare it so.

When the act provides that in case of default the company shall "forfeit the rights" held by it under the act of incorporation, that alone does not put an end to the corporate existence, but simply gives the state a right to enforce the forfeiture.

Street-railway franchises granted by the legislature have been distinguished from the mere license of the city to occupy its streets. As before explained, the latter is not a franchise, but simply a license which, if not acted upon by the grantee within the time fixed by the ordinance, or if attempted but subsequently abandoned, may be granted by the city to another company without first securing a decree of forfeiture from the courts.

797. Unauthorized Use of Streets and Ways.—The unauthorized use of public highways by a street railway in the construction and operation of its road is a nuisance of itself, being an invasion of the public rights therein. For maintaining such a nuisance a street-railway company may be indicted, or it may be enjoined by the public authorities, or by a private citizen who makes out a case of special damages to himself. The fact that a city has the right to remove the track by force is no objection to the granting of an injunction against the wrongful laying of such track. This is upon the ground that when a party has the remedy by his own act, involving the use of force, it does not constitute an adequate remedy at law which will exclude the

[1] 23 Amer. & Eng. Ency. Law 976.

equitable relief.[1] If a road be constructed in a manner which is not authorized by the statute under which the corporation was organized, and if the grade do not conform to the grade of the street, the road may be adjudged a public nuisance.[2]

A street-railway company is confined strictly to the streets which it is authorized to occupy, and a track built where the company has no authority to place it is a nuisance which may be enjoined.[3]

The erection without competent legal authority of a wall of masonry and an iron structure along the middle of a highway by a surface-railroad company, to connect its tracks with those of an elevated-railroad company, constitutes a nuisance.[4] The use of the tracks of a street-railway company for private purposes has been held to constitute a nuisance.[5]

If the nuisance be purely a public one, it can be restrained only by public authority. In order that a private citizen or corporation may enjoin the unauthorized use of a public street by a railway company, special damages must be shown to have been suffered by such party.[6]

Where a bill to enjoin defendant from constructing an electric street railroad in certain streets in a city, though filed in form by the attorney-general in behalf of the people of the state, was not filed for the purpose of asserting any public right or protecting any public interest in the streets, but was filed at the instance of rival railway companies, it was held to have been properly dismissed.[7]

A grant by a city to a street railway of a right of way for its track over a remote portion of a public park which does not interfere with the free passage or use thereof in the customary manner has been held not to create such a nuisance as will enable an individual to maintain an action in behalf of the public to abate and enjoin the same.[8]

798. Electric Trolley Lines upon Streets and Ways.—A contention that an electric trolley system with its poles and wires and its track constituted a new servitude upon the street was not sustained, and the electric railway was considered to be no different from other street railroads in this regard, it being held that the question whether or not an additional burden was imposed could not be determined from the motive power employed.[9]

The wires of an electric railway have been distinguished from telegraph-wires. Telegraph- and telephone-wires have been held *not* to be for the purpose of facilitating the use of the streets, whereas the poles and wires of an

[1] 23 Amer. & Eng. Ency. Law 959.
[2] Denver, etc., R. Co. *v.* Denver City R. Co., 2 Col. 673.
[3] Stamford *v.* Stamford Horse R. Co., 56 Conn. 381; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339. *And see* Zabriskie *v.* Jersey City, etc., R. Co., 13 N. J. Eq. 314.
[4] Eldert *v.* Long Island Electric Ry. Co., 51 N. Y. Supp. 186.
[5] Fanning *v.* Osborne, 192 N. Y. 441.
[6] 23 Amer. & Eng. Ency. Law 959. *See also* Musser *v.* Fairmont, etc., St. R. Co., 7 Amer. Law Reg. 284; Roberts *v.* Easton, 19 Ohio St. 78.
[7] People *v.* General Electric Ry. Co., 50 N. E. Rep. 158, 172 Ill. 129 [1898].
[8] People *v.* Park & O. N. Co. (Cal.), 18 Pac. Rep. 141 [1888].
[9] 23 Amer. & Eng. Ency. Law 957 *and many cases cited.*

electric trolley system are directly auxiliary to the uses of the street in that they communicate the power by which the street cars are propelled.[1]

When, however, an electric passenger railway, running on the highways through country towns, proposes to grade down the highways to such an extent as to impair the right of access of abutting owners, it imposes an additional burden on such highways.[2]

Ordinary railroads are not to be distinguished from street railways in this respect by the motive power employed, but in the character of the use. A street railway is auxiliary to the use of the street. It is a mode of travel, and is closely allied to those vehicles in common use upon the highway, and as a matter of fact and common knowledge is very much less of an obstruction than an ordinary railroad.

The fact that a kinetic motor is still in its experimental stages, or that the company operating a street railroad is controlled by persons interested in the motor system, is no ground upon which to withhold the consent of the railroad commissioners for the operation of the street railroad with such motors.[3]

799. Change of Motive Power on Street Railway.—Where street-railway charters were granted when horse power was the only motive power utilized, the courts have shown some reluctance in construing them so as to authorize the substitution of steam, cable, compressed air, or electricity to the possible detriment to public traffic. A change from horse to mechanical power may not change the character of the railway, though it might be an additional burden upon the street. Nowadays the motive power contemplated is usually specified in the charter.[4]

Under the general power of police regulation a city may forbid the use of a mechanical power where the safety of the public demands it. This is so even though the charter may have authorized the use of such a power. The use of steam in the streets of a city has been declared a nuisance and its use enjoined. It has also been held within the powers of the city to authorize a change of power or the use of a particular power. The legislature may, of course, authorize an adoption of the motive power not allowed by the company's charter. The motive power adopted or implied does not change the character of the railway. It remains a street railway, and the rules of law and the requirements of statutes or ordinances relative to street railways apply.

[1] Judge Dillon, 2 Dill. Munic. Corp. (4th ed.), § 734. *But see, contra*, Jaynes *v.* Omaha St. Ry. Co. (Neb.), 74 N. W. Rep. 67.

[2] Zehren *v.* Milwaukee Elec. Ry. & L. Co., 74 N. W. Rep. 538 [1898].

[3] People *v.* Board of Railroad Com'rs, 52 N. Y. Supp. 908 [1898].

[4] 23 Amer. & Eng. Ency. Law 996 *and cases cited.*

CHAPTER XXXIX.

RIGHT OF WAY FOR TELEGRAPH AND TELEPHONE LINES.

811. Telegraph and Telephone Lines in Public Ways.—The laws and rules governing rights and ways for telegraph and telephone lines do not differ materially from those governing railroads and street railways. The former are usually built upon country roads, highways, or in the streets of a village or city; and it is necessary that authority shall be granted such companies for the construction of their lines upon public ways, as such rights cannot exist from implication.[1] The laws and statutes applicable to "telegraph" companies and giving certain powers to them, as the power to exercise the right of eminent domain, apply equally to "telephone" companies.[2]

812. Authority to Occupy Streets must Come from Legislature.—To authorize the use of streets for telegraph-poles, it is necessary that legislative sanction should be directly given or immediately conferred through proper municipal action. If such poles be erected within the limits of the street or highway without such sanction, they are nuisances; but if the erection be authorized, they are not nuisances.[3] The ultimate authority to grant such privileges rests in the legislature by virtue of its power of control over all streets and highways.[4]

Such power of the legislature may be delegated to cities and villages, and in general a city or village *has* the power to grant to a telephone or telegraph company the right to construct a line upon its streets, provided such construction does not interfere with the free use of the streets by the public.[5] In the state of New Jersey it is required by statute that the consent of town authorities shall be obtained before the telegraph lines may be built.[6] In many states

[1] New York, etc., Teleph. Co. *v.* East Orange Tp., 42 N. J. Eq. 490; Atty.-Gen'l *v.* United Kingdom Tel. Co. (Eng.), 30 Beav. 287.

[2] Gulf, etc., Ry. Co. *v.* Southwestern Teleg. & Teleph. Co. (Tex.), 45 S. W. Rep. 151.

[3] Com. *v.* Boston, 97 Mass. 555; Young *v.* Yarmouth (Mass.), 9 Gray 386; Reg. *v.* United Kingdom Tel. Co., 9 Cox C. C. 171. *And see* 2 Dillon on Munic. Corp. (3d ed.) 698.

[4] Hudson Teleph. Co. *v.* Jersey City, 49 N. J. Law 303; Irwin *v.* Gt. So. Teleph. Co., 37 La. Ann. 63.

[5] 25 Amer. & Eng. Ency. Law 753; 2 Dillon on Municipal Corp. (4th ed.), § 719.

[6] Broome *v.* N. Y., etc., Teleph. Co., 49 N. J. Law 624; State *v.* Newark (N. J.), 8 Atl. Rep. 128 [1887]. *And see* State, Meyers *v.* Hudson Co. E. Co. (N. J.), 37 Atl. Rep. 618; King *v.* Poor Laws Com'rs, 6 Ad. & El. 7.

it is held that a legislative act or municipal ordinance which authorized the construction of a line upon a street is void if it fail to provide for compensation to abutting owners.[1]

813. Restrictions Imposed by Legislature.—Frequently the legislative grant to occupy city streets is conditioned upon obtaining the consent of the city, and power is given to the city to impose restrictions and conditions.[2] If no such conditions are imposed by the legislature, it seems the city cannot impose restrictions, nor can village authorities interfere with the exercise of a company's rights.[3] A charter authorizing a license-tax for regular telephone companies has been held to confer power to grant to such companies the right to erect poles in the streets.[4]

814. Telegraph Lines a Burden upon Streets.—Occupation of a street by a telegraph or telephone line and poles constitutes a new use of the street and an additional burden upon it. Owners of abutting property are entitled to compensation for such a use; but the erection and maintenance of electric street-railway poles in the street if properly placed is not an additional burden.[5] The right to use the street for telegraph and telephone lines must be acquired by condemnation proceedings, or by voluntary consent of the abutting landowners. Where the only injury shown was that which would result from wires passing over the street in front of premises, the court held that the case did not authorize an injunction against the erection of the poles and wires.[6] Courts are, as a rule, slow to require the removal of a public work or a suspension of its operations after it has been erected and completed. If an injunction be granted at all in such a case, it is usually on condition that it shall be inoperative if the company shall make proper compensation within a reasonable time. Such a case is one in which a court might be justified in refusing an injunction which would prevent the completion of a work of great public benefit, and is one in which the rights of the public might suffer if an injunction were granted. The court might say to the plaintiff who sought an injunction in such a case that he had a remedy at law for damages which he had suffered. It is insisted on the other hand that the proprietary rights of the landowner would be interfered with in a manner detrimental to his interest as owner of the fee, and that the action of a telephone company in taking possession of his land forcibly and against his will comes within the constitutional inhibition that private property shall not be taken or damaged without just compensation.

[1] Stowers *v.* Postal Tel. Co., 68 Miss. 559; Chesp., etc., Teleph. Co. *v.* MacKenzie, 74 Md. 36; So. West. R. Co. *v.* So. Tel. Co., 46 Ga. 43; State, Meyers *v.* Hudson Co. E. Co. (N. J.), 37 Atl. Rep. 618.

[2] 2 Dillon on Municipal Corp. (4th ed.), § 706.

[3] State *v.* Flad, 23 Mo. App. 185. *See* State, Mathews *v.* Central U. Tel. Co., 14 Ohio C. C. 273, *and* Commonwealth *v.* Warwick (Pa.), 40 Atl. Rep. 93 [1898].

[4] Hershfield *v.* Rocky Mt. Bell Teleph. Co., 12 Mont. 102.

[5] Snyder *v.* Ft. Madison St. Ry. Co. (Iowa), 75 N. W. Rep. 179; 25 Amer. & Eng. Ency. Law 753, *many cases cited;* Eels *v.* Amer. Teleg. & Teleph. Co. (Sup.), 20 N. Y. Supp. 600.

[6] Roake *v.* Amer. Tel. Co., 41 N. J. Eq. 35.

This position is without doubt the one sustained by the best authority, and it rests upon sound principles of law. The construction and maintenance of a telegraph or telephone line upon a highway is a new and additional burden upon the fee and one to which it was not contemplated that the highway should be subjected, and for this reason the owner is entitled to additional compensation.[1] The same has been held true of the poles and wires of an electric railway.[2]

Where a telephone company, through its employees, had been placed in possession of a line of way and of telephone-posts on the property of another without legal right, a prayer by the owner for the removal of the posts will not be granted where the evidence shows that the company would be entitled to have the same line re-established as its right of way, and its posts immediately replaced in the same position. The company, however, will be compelled to pay the value of the right of way, and damages for the illegal invasion of the owner's right of property.[3]

815. Owner of Street Entitled to Compensation for Additional Burden. —Where, however, the absolute ownership of the highway is vested in the public, there can be no legal objection to a grant by the public of the right to erect such poles and wires without regarding the adjacent property owners. Usually, however, as we have seen,* the property in the street belongs to adjacent owners, and only those uses of a street have been permitted which are incident to public travel. It is clear that every use of the highway which is not incident to travel is an additional burden for which the owner of the soil of the street is entitled to additional compensation; and this right cannot be taken from him without his consent except by proceedings regularly instituted and prosecuted according to law.[4] A county board has no power to permit a telegraph company to erect poles in a highway without compensation to the owner of the fee therein, in view of the constitutional declaration that "private property shall not be taken or damaged without just compensation."[5]

As Judge Dillon has said in his book on municipal corporations: "The author considers the true doctrine to be that the rights of an abutter as between himself and the public are substantially the same whether the fee is in him subject to the public use, or in the city in trust for the street use proper. On the whole," he says, "the safer and perhaps sounder view is that such a use of a street or highway, attended as it may be, especially in cities, with serious damage and not being a convenience to the abutting owner, is not a street or

[1] 25 Amer. & Eng. Ency. Law 754, *and cases cited.*

[2] Jaynes *v.* Omaha St. Ry. Co. (Neb.), 74 N. W. Rep. 67. *Contra*, Snyder *v.* Ft. Madison St. Ry. Co. (Iowa), 75 N. W. Rep. 179 [1898].

[3] Fuselier *v.* Great So. Teleg. & Teleph. Co., 24 So. Rep. 274.

[4] Pac. Post. Tel. Cab. Co. *v.* Irvine, 49 Fed. Rep. 113.

[5] Const., art. 2, § 13; Postal Tel. Cable Co. *v.* Eaton, 170 Ill. 513 [1897].

* *See* Secs. 441–460, *supra.*

highway use proper, and hence entitles the owner to compensation for such use or for any actual injury to his property caused by poles and lines and wires placed in front thereof." [1]

The legal consent of the state to the erection of poles in highways is only intended to protect the telegraph company from indictment for maintaining a public nuisance by so doing. It gives the company no right to erect such poles unless the owner consents or receives compensation.[2]

The law as expressed in the text of the last paragraph is not universally recognized. The Massachusetts courts have held that an act authorizing the construction of telegraph lines in highways did not provide for compensation to abutting owners, and that nevertheless the statute was constitutional and valid since no additional servitude was imposed by the erection of poles and wires along the highway. This Massachusetts doctrine has found some favor in other courts, among them those of Indiana,[3] Louisiana, Missouri, and the District of Columbia, but the decisions have not been without strong dissenting opinion in many of the cases.[4]

816. Measure of Damages for Use of Street for Telegraph Lines.— Abutting owners are not only entitled to compensation for the use of a street, but also to damages for any material injury to their easement of access to, or passage over, the street. Ownership of the fee of the soil of the street occupied does not affect their rights.[5]

The measure of damages to the abutting owner is the amount which the value of the property has been diminished either in rents or in its market price, or the difference in the value of the property before and after the construction of the line.[6]

Under an ordinance authorizing a telephone company "to run and maintain its wires over and through the streets of the city . . . for the purpose of establishing telephonic communication between its patrons and between its exchange office and the subscribers thereto," and imposing as a condition only that it comply with all ordinances "regulating or in any manner controlling . . . telephone companies in the use of the streets for . . . telephone purposes," the determination of what streets shall be occupied is for the company, except possibly in the case of some street exceptionally situated.[7]

The original grant to a telephone company to occupy any streets is not affected by the mode of use being changed, by the concurrent act of the city and company, from the overhead to the underground system, and it cannot afterwards be limited by the city.[7]

The authority retained by a city to regulate the manner of occupation of its

[1] 2 Dill. on Munic. Corp. (4th ed.), § 698.
[2] Eels *v.* Amer. Teleg. & Teleph. Co. (Sup.), 20 N. Y. Supp. 600.
[3] Magee *v.* Overshiner (Ind.), 49 N. E. Rep. 951 [1898].
[4] 25 Amer. & Eng. Ency. Law 754, 755.
[5] Jaynes *v.* Omaha St. Ry. Co. (Neb.), 74 N. W. Rep. 67; 25 Amer. & Eng. Ency. Law 755.
[6] Chesp., etc., Teleph. Co. *v.* McKenzie, 74 Md. 36.
[7] Commonwealth *v.* Warwick (Pa.), 40 A. Rep. 93 [1898].

streets by a telephone company includes the power to compel adoption from time to time of all reasonable and generally accepted improvements which tend to decrease the obstruction of the streets or to increase the safety or convenience of the public.[1]

The Laws of New York 1886, chap. 40, sec. 1, provide as follows: "Whenever any wire or cable used for any telegraph, telephone, electric light, or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to such attachment or extension." The furnishing of light to citizens is a sufficient public use to sustain the grant by a city of the right to erect wires and poles in the streets for furnishing electric light. An ordinance granting such a right cannot be repealed or changed in the absence of a reservation therein of the right so to do.[2] But in New York such wires and poles constitute unlawful obstructions, which the corporation may remove after they cease to be used.[3]

817. Telegraph Company's Liability for Injuries by Lines and Poles. —Where the company has acquired no right to occupy the street with its lines, its occupation thereof is unlawful and amounts to a public nuisance, and abutting owners may have an injunction against it or they may bring an action for damages.[4]

Where a company acted upon the assumption that it had the legal right of constructing its line on a road without asking or obtaining the consent of abutting owners, or seeking to acquire its rights by negotiation or condemnation, such abutting owners are not estopped on the ground of acquiescence from maintaining an action.[5]

A grant of a right of way along the street confers upon a telegraph or telephone company no right to trespass upon private property abutting, as to cut the limbs of trees projecting over the sidewalk, or so to place its poles as to incommode or injure the public in the use of the street. For such trespasses the company is liable in damages.[6] However, it has been held that a telephone company cannot be required to locate its poles so as to provide against all possible injury that might happen under extraordinary circumstances.[7]

Where a telephone or telegraph company occupies private property with its poles and wires, the owner of such property is entitled to compensation for the injuries which he suffers. A right to occupy one's land with such poles

[1] Commonwealth *v.* Warwick (Pa.), 40 Atl. Rep. 93 [1898].

[2] Levis *v.* Newton (C. C. S. D. Iowa), 75 Fed. Rep. 884.

[3] Hempstead *v.* Ball Electric Light Co. (N. Y.), 9 App. Div. 48.

[4] 25 Amer. & Eng. Ency. Law 755.

[5] Blashfield *v.* Empire State Teleph. Co. (Sup.), 18 N. Y. Supp. 250; Abendroth *v.* Manhattan R. Co., 122 N. Y. 1. *But see* Western Union Tel. Co. *v.* Bullard (Vt.), 31 Atl. Rep. 286. *and* York Teleph. Co. *v.* Keesey (Com. Pl.), 5 Pa. Dist. Rep. 366.

[6] 25 Amer. & Eng. Ency. Law 755, *and cases cited.*

[7] Sheffield *v.* Cent. Union Teleph. Co., 36 Fed. Rep. 164.

and wires can be acquired only by contract or by condemnation proceedings. If the wires extend over one's land, even without any actual occupation of the soil, the owner thereof is entitled to compensation. Doubtless in such a case the damages assessed would be merely nominal, and it may even be doubted if the courts would recognize such an injury.[1]

In the present day, when telephone and telegraph wires are so likely to become crossed with transmission-wires of high potential, a telephone or telegraph wire strung above or over a man's house or estate is a much more serious, if not dangerous, matter than it was ten years ago, and damages might be assessed to compensate for the risk assumed by having such a wire over one's possessions.[2]

818. Telegraph and Telephone Line on Railroad Right of Way.—A telegraph or telephone line upon a railroad right of way is an additional burden upon the land for which the original owner of the land, if he retain the fee, may recover additional compensation.[3]

Where a railroad company condemns or purchases a right of way it takes that right of way for the purpose of location, construction, and operation of its road and for other purposes incident thereto. If, therefore, in the operation of the railroad it require the use of a telegraph line, it may erect such a line upon its right of way without being subject to claims for additional compensation, if the line be reasonably necessary for the proper operation of the road.[4]

A telegraph line subjects the easement of a right of way of a railroad company to an additional servitude for which the company itself is entitled to compensation under constitutional provision against the taking of private property. When a legislative act provides that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," it does not authorize the condemnation of a right of way by a telegraph company along and upon the right of way of any railroad company.[5]

Where the lines of a telegraph company have been erected upon the right of way of a railroad company under a contract which provides that, the railroad company shall become entitled to the property, upon dissolution or discontinuance of operations by the telegraph company, the right of way of the telegraph company is lost by the surrender of its charter just prior to the expiration of the same and a reincorporation under a subsequent statute, even though such statute provides that the new company shall take all the property of the old company.[6]

[1] Roake *v.* American Teleph. Co., 41 N. J. Eq. 35.

[2] *See* Plummer *v.* Gloversville Elec. Co. (N. Y.), 20 App. Div. 527 [1897].

[3] 25 Amer. & Eng. Ency. Law 756 *and cases cited.*

[4] Western Tel. Co. *v.* Rich, 19 Kan. 517; Taggart *v.* Newport St. R. Co., 16 R. I. 688.

[5] Postal Tel. Cab. Co. *v.* Norfolk, etc., R. Co., 88 Va. 920; New York State, etc., R. Co. *v.* Cent. Union Tel. Co., 21 Hun (N. Y.) 261.

[6] Latrobe *v.* Western Tel. Co., 74 Md. 232; Western Telegraph Co. *v.* Baltimore, etc., R. Co., 67 Md. 211.

A license by a railroad company to maintain a telegraph line along its road so long as the licensee exists as a telegraph company expires with the expiration of the telegraph patents held by the licensee, and a reincorporation does not affect the case.[1]

819. No Exclusive Rights for Telegraph Lines on Railroads.—There is nothing to prevent a telegraph company from acquiring a right of way by contract with a railroad company over its right of way, though it cannot contract for an exclusive right. Such exclusive rights are not favored in law, and a railroad company, usually having nothing more than an easement in the land over which its right of way passes, has no power to grant exclusive privileges as to it.[2]

A railroad company cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other companies whose lines would not interfere with those of the first company.[3] There are a few decisions to the contrary where contracts for the exclusive right to occupy the right of way of a railroad company have been upheld.[4] Such a contract is not void so far as it excludes other telegraph companies from poles erected upon the right of way and occupied by one telegraph company.[5]

A contract by a railroad company not to construct or allow to be constructed another telegraph line along or upon its right of way was held not void as against public policy.[6] Since the passage of an act of Congress[7] a state cannot grant to a telegraph company exclusive rights in a right of way of a railroad within the state. The statute is a prohibition of all state monopolies in this particular.[8]

820. Government Grants of Rights of Way.—By statute of the United States a right of way is granted over the public lands and the military or post roads to all telegraph companies complying with certain conditions. Any company organized under the laws of any state, under these statutes, has the right to construct, maintain, and operate its telegraph lines over any part of the public domain, under or across any of its navigable streams or waters, provided such lines are not placed so as to obstruct navigation or interfere with the proper use of military or post roads.[9] Stone, timber, and other materials for its poles, stations, and other necessary uses in constructing its line may be taken from the public lands through which the line passes, and the company may pre-empt such portions of the public lands as may be necessary for its stations, not exceeding forty acres for each station, such stations not to be within fifteen miles of

[1] Western Union Tel. Co. *v.* Baltimore, etc., R. Co., 20 Fed. Rep. 572.
[2] Pacific Post. Tel. Cab. Co. *v.* West. Union Tel. Co. (Cir. Ct.), 50 Fed. Rep. 493; 25 Amer. & Eng. Ency. Law 757.
[3] United States Rev. Stat., § 5263; Western Union Tel. Co. *v.* Amer. Un. Tel. Co. (U. S.), 9 Biss. 72.
[4] Canadian Pac. R. Co. *v.* Western Un. Tel. Co., 17 Sup. Ct. Can. 151.
[5] Western Un. Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246.
[6] Western Un. Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Biss. (U. S.) 367.
[7] Rev. Statutes U. S. 5263–5268.
[8] Pensacola Tel. Co. *v.* Western Un. Tel. Co., 96 U. S. 1.
[9] United States Rev. Statutes, § 5263.

each other.[1] These rights and privileges, however, are not to be transferred by any company acting thereunder to any other corporation, association, or person.[2]

For these privileges and grants, telegrams between the several departments of the government and their officers and agents have priority over all other business, and at such rates as the Postmaster-General may fix. Any company refusing to comply with the provisions of this statute may not be paid any part of the appropriations of the several departments of the government.[3]

In these statutes the United States reserves the right to purchase all telegraph lines and other property at an appraised value to be ascertained by five competent disinterested persons, two to be chosen by the Postmaster-General, two by the company, and one by these four, and before any telegraph company may exercise any of the powers and privileges conferred it must file with the Postmaster-General its written acceptance of the restrictions and obligations required.[4] A penalty is provided of not less than one hundred dollars nor more than one thousand dollars for every refusal or neglect to transmit any proper message offered by the government or its officers or agents concerning government affairs.[5]

821. Ways that are Post-roads.—Another United States statute declares all railroads to be post-roads.[6]

A railroad being a post-road, it cannot, therefore, grant any telegraph company an exclusive right of way.[7]

These United States statutes were enacted under the congressional powers of control over interstate commerce, and their constitutionality may not be doubted; they have superseded all conflicting state legislation on the subject.[8] A statute, however, has been held not to authorize telegraph companies to occupy a railroad company's right of way without compensation, but the privileges under the act are subject to the prior rights of other companies.[9]

Revised Statutes 1866, §§ 5263, 5268, 5269, authorizing telegraph companies complying with its terms to construct and maintain their lines along and over all post-roads of the United States, and Revised Statutes, § 3964, making all railroads post-roads, do not empower a telegraph company to occupy the right of way of a railroad with its line without the consent of the railroad company, or a contract with a prior owner which is binding upon it.[10]

A court of equity has no power, on the ground of public necessity, to effect

[1] United States Rev. Statutes, § 5264.
[2] United States Rev. Statutes, § 5265.
[3] United States Rev. Statutes, § 5266. *And see* United States *v.* Union Pac. R., 45 Fed. Rep. 221.
[4] United States Rev. Statutes, § 5267, 5268.
[5] United States Rev. Statutes, § 5269.
[6] United States Rev. Statutes, § 3964. *And see* Postal Laws, vol. 18, page 865.
[7] Western Un. Tel. Co. *v.* Baltimore, etc., R. Co., 19 Fed. Rep. 660; Union Trust Co. *v.* Atchison, etc., R. Co. (N. M.), 43 Pac. Rep. 701; Pensacola Tel. Co. *v.* Western Un. Tel. Co., 96 U. S. 1.
[8] 25 Amer. & Eng. Ency. Law 759.
[9] Atlantic, etc., Tel. Co. *v.* Chicago, etc., R. Co., 6 Biss. (U. S.) 158; Western Un. Tel. Co. *v.* Amer. Un. Tel. Co., 9 Biss. (U. S.) 72.
[10] Western Un. Tel. Co. *v.* Ann Arbor R. Co., 90 Fed. Rep. 379.

an equitable condemnation of an easement of way for a telegraph line over the right of way of a railroad on which it was built and operated under a contract with a prior owner of the road, which contract has been terminated by the sale of the road on foreclosure of a mortgage antedating such contract.[1]

The telegraph company must obtain the consent of the owners of the right of way or condemn it for telegraph purposes and make compensation therefor.[2]

The streets of the District of Columbia have been declared to be post-roads within the meaning of the statute, and telegraph companies may construct their lines on such streets without compensation to abutting owners.[3]

822. State Statutes Superseded by United States Laws.—There are state statutes which grant rights of way to telegraph companies under certain conditions and restrictions, but, as before stated, they are in certain particulars superseded by the United States statutes. Some of the state statutes also determine the rights of the telegraph and telephone companies to place their poles along city streets, as well as the proceedings necessary for the determination of such a right of way and for the determination of the compensation to be paid to the owners or abutting owners of the property over which the line passes.[4] It has been declared that such statutes authorizing the construction of telegraph lines on state or county roads do not authorize the occupation of the highway without compensation to the abutting owners who have retained the fee of the soil of the highway.[5]

Though a state may grant exclusive privileges between certain points to a telegraph company, yet such a grant should be held subject to prior acquired rights of other companies.[6]

823. Restrictions and Conditions Imposed by Laws and Ordinances.—In general the law applicable to rights of way of railroad companies, pipe lines, and other *quasi*-public institutions applies to rights of way of telegraph companies; and it has been held that the law, or a statute, applicable to a telegraph company is equally applicable to a telephone company at least so far as the right of way or the construction of its lines are concerned. This statement, of course, is subject to the modifications which arise from the difference in the construction demanded, the uses to which the lines are put,[7] or the special statutes which have been passed by the state and the federal government in regard to telegraph and telephone companies. Thus in the state of New Jersey the law requires that the size of the poles as well as the positions in which they are to be placed should be indicated.[8]

[1] Western Union Tel. Co. *v.* Ann Arbor R. Co., 90 Fed. Rep. 379 [1898].

[2] Amer. Teleph. Co. *v.* Pearce, 71 Md. 535.

[3] Hewett *v.* Western Un. Tel. Co., 4 Mackey (D. C.) 424.

[4] *See* 25 Amer. & Eng. Ency. Law 760 *and cases cited.*

[5] Western Un. Tel. Co. *v.* Williams, 86 Va. 696; Postal Tel. Cable Co. *v.* Norfolk, etc., R. Co., 88 Va. 920.

[6] California, etc., Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

[7] 25 Amer. & Eng. Ency. Law 760.

[8] Broome *v.* N. Y., etc., Teleph. Co., 49 N. J. Law 624.

824. Telegraph Lines across Navigable Waters.—In order for a telegraph company to secure a right to construct its right of way across navigable waters under United States statutes it will be required to file with the Postmaster-General its written acceptance of the obligation imposed by the statutes.[1] And the company must not interfere with the opening of drawbridges or otherwise obstruct navigation in the construction of its line over navigable waters.[2] Such telegraph lines when laid in the bottom of a navigable river must be laid with due care and foresight. A company has been held liable for injuries to vessels by having their anchors caught in a submarine cable.[3]

825. Proceedings to Condemn a Right of Way.—In some states the laws require that a company shall make an effort to contract with the landowners before resorting to condemnation proceedings. In such cases the company, it seems, need only make a proposition to the landowners and wait a reasonable time for a reply, in the absence of which it may condemn a right of way.[4] The determination of the compensation due to a railroad company for a right of way of a telegraph line fixed by the commissioners appointed is not necessarily final.[5]

In condemning a right of way for a telegraph line the company does not acquire the fee of the soil and use of the land except for the purpose of erecting and maintaining its telegraph poles and wires.[6] A landowner is not to be deprived of his use of the land except so far as such use is inconsistent with the rights of the company, nor is he bound to fence his land from the strip condemned for a right of way.[6] A grant to a telephone company to run and maintain wires "over and through" the streets does not include permission to lay them underground.[7]

826. Liability for Negligence in Erecting and Maintaining Telegraph Lines.—In the construction of its line a telegraph company must exercise proper care to prevent injuries to persons using the street, and it is responsible for all injuries which result by reason of improper construction or maintenance. If a pole be located and maintained so that it is a dangerous obstruction in a street, and a frightened horse run against it to the injury of a person driving, the company is not relieved from liability because the city authorized its erection.[8]

Wires may not be permitted to swing down so low as to obstruct travel without explaining and showing that it was not negligence on the part of the company. If guilty of negligence, the company is liable for

[1] Chicago, etc., Bridge Co. *v.* Pac. Mut. Tel. Co., 36 Kan. 113.
[2] Pac. Mut. Tel. Co. *v.* Chicago, etc., Bridge Co., 36 Kan. 113.
[3] City of Richmond, 43 Fed. Rep. 85.
[4] Louisville, etc., R. Co. *v.* Postal Tel. Cab. Co., 68 Miss. 806.
[5] Postal Tel. Cab. Co. *v.* Norwalk, etc., R. Co., 87 Va. 349; Louisville, etc., R. Co. *v.* Postal Tel. Cab. Co., 68 Miss. 806.
[6] Lockie *v.* Mut. Un. Tel. Co., 103 Ill. 401.
[7] Commonwealth *v.* Warwick (Pa.), 40 Atl. Rep. 93 [1898].
[8] 25 Amer. & Eng. Ency. Law 761.

injuries sustained by persons from being thrown down or out of moving vehicles, or for injuries from shocks from electricity due to the wires being charged either from natural or artificial sources.[1] Such companies are not liable unless the proximate cause of the injury is due to its negligence. A company may not be required to anticipate and provide against extraordinary and unexpected storms.[2] A company is not relieved from liability by the abandonment of its property.[3]

If the city authorized the erection of poles in such manner and place that they constitute a nuisance, the city as well as the company is liable for the injuries resulting. The city has no right to authorize the erection of poles which are dangerous to people properly using a street, and the company may not claim freedom from liability on the ground that its act was authorized by the city.[4]

The danger attending the location is to be determined by the jury. It must be clearly proved that the location of poles is dangerous, for it is not sufficient to show the objects of danger. Poles erected upon a highway as close as possible to the side, so as not to have the cross-bars extend over private property, were held not to constitute such a dangerous location as would entitle a person to recover for injuries to a runaway horse.[5]

The ground of liability is the negligence of the company in constructing and maintaining its lines. It is not liable merely because of the presence of its lines which contribute to the injury, as where poles and wires interfere with the operations of a fire company and prevent the extinguishment of a fire.[6]

An electric-light pole in a village street has been adjudged to be a nuisance, in an action against the village for damages occasioned thereby. The village, having affirmatively assented to the location of the pole, had no recourse against the electric-light company. It was held that as it was adjudged that the pole was a nuisance because of its location, and not because of the use to which it was put, the plaintiff and the electric-light company were in the position of joint wrong-doers, and were *in pari delicto*, and the village was therefore held not entitled to claim indemnity or contribution from the electric-light company.[7]

In the proof of improper or negligent construction of telegraph lines, the general rules and laws of negligence prevail in matters of evidence, burden and proof, etc.

827. Rights Attending a Prior Occupation of Right of Way.—In the many applications of electricity which have recently been made many nice

[1] 25 Amer. & Eng. Ency. Law 761, 762, *and cases cited.*

[2] Ward *v.* Atlantic, etc., Tel. Co., 71 N. Y. 81.

[3] Nichols *v.* Minneapolis, 33 Minn. 430.

[4] 25 Amer. & Eng. Ency. Law 762.

[5] Roberts *v.* Western Un. Tel. Co., 77 Wis. 589. *And see* Allen *v.* Atlantic, etc., Tel. Co., 21 Hun (N. Y.) 22; Sheffield *v.* Cent. Un. Tel. Co., 36 Fed. Rep. 164.

[6] *See* Cheffee *v.* Telephone, etc., Construction Co., 77 Mich. 625, *and see* the Dissenting Opinion; *and see* Thompson on Electricity, § 25.

[7] Geneva, Trustees of, *v.* Brush E. Co. (N. Y.), 50 Hun 581 [1888].

questions of law have been presented to the courts which have not been definitely settled, and many more are destined to arise which have not yet been adjudicated. In the application of electricity as a motive power on street railways and the thousand and one applications to domestic purposes there is a constant source of danger to many other structures. This is due to the leakage and return of the electric currents to its source. From every electric motor driven by electricity generated at a station there is a return current which may or may not traverse the conductor provided for it on its return to the generator. If this current escape from the return conductor provided, it may traverse steel and iron structures in which the connections are not perfect, and this results in corrosion of the material of the structure, and frequently ends in the destruction of its usefulness.

The creation of a powerful current of electricity in a conductor has a considerable and sometimes injurious effect upon other conductors and currents of electricity in the vicinity. A current of electricity of high potential traversing a trolley wire, or conductor, suspended from poles along a street may induce such currents in the telegraph or telephone wires in the vicinity as to destroy their usefulness for the purpose for which they were erected; and if by accident such conductor charged with a heavy current of electricity shall come in contact with a telephone or telegraph wire which was not intended to convey such a powerful current, it may cause a destruction of the delicate and valuable apparatus attached to the telephone or telegraph wire or may lead to accidents resulting in death of persons coming in contact with such wires. These conditions raise important questions as to the rights of telegraph and telephone companies to enjoy the rights of way upon which they have erected their lines, and questions as to what damages may be recovered for such injuries caused by other companies occupying rights of way in the immediate vicinity of their lines. Suits have been brought to enjoin other companies from placing their wires charged with heavy currents of electricity in close proximity to telegraph and telephone wires, and from using the earth as a return circuit for such currents. As street railways using electric motive power have their rails for a return conductor, and since such rails are reasonably suitable for the purpose, the burden of erecting a return current circuit has usually been imposed upon the telephone companies.[1]

828. Interference with Telephone Lines by Induction.—Interference with telephone lines due to induction from the proximity of parallel wires conveying a stronger current is easily prevented, and a court of equity will grant relief against it upon proper showing by the telephone company. The right to such relief may depend upon whether the company complaining has a prior right of way over the space covered by its wires, and as against the defendant company.

[1] *See* Keasbey on Electric Wires 139; Thompson on Electricity (§ 43, 50), etc.; Hudson Riv. Teleph. Co. *v.* Watervliet Tpk. Co., 135 N. Y. 393, 61 Hun (N. Y.) 141; Cumberland Teleph. Co. *v.* United Elec. R. Co., 42 Fed. Rep. 273.

A company which owns a prior right of way will not be enjoined from its beneficial use in favor of a subsequent occupant.[1]

A telephone company which has a prior right of way upon a street has been granted an injunction against an electric-light company from constructing its lines within such a distance as should interfere with the effective and successful use of the telephone wires, and from erecting its lines in such way as to be a source of danger to such telephone lines in case of accident from breakage or other accidents which might bring the two lines in contact.[2]

In another case an injunction was denied because it appeared from the testimony that there would be no sensible diminution in the current of a telegraph line due to or caused by induction from close proximity of the wires, and that the danger to linemen engaged in repairing the telegraph lines could be avoided by having the electric-light current so that it could be shut off on notice, which would only be required during the daytime; and, further, that the danger from falling wires in storms was too uncertain to be considered. A circumstance of the case was that an injunction was granted with the limitations just stated, with the reserved right to modify its decisions after experiment.[3]

829. Protection of Wires from Contact with Other Wires.—It has been held a duty of the telephone company so to construct its line as not to interfere with the free use of the street by the public for purposes of travel and transportation, and that this duty includes operations necessary to keep its wires from coming in contact with those of the street railway subsequently occupying the street.[4]

830. Disturbance and Damage from Conduction.—In the matter of disturbance from conduction or leakage of electricity and which results from the use of an imperfect return circuit or from the use of the earth as a return conductor, the question as to the prior right of way and occupation has been considered as material, and injunctions against railroad companies have been denied in all cases. The decisions have rested on the ground that when a person or corporation makes a lawful use of his own property or of a public franchise, and in so doing injury results to another, the question of liability will depend upon whether use has been made of the best known means. It is not required that one should adopt exclusive devices or the most recent inventions when the party injured could protect himself by the use of an effective and inexpensive device. When the use of a metallic circuit by either party to the suit would prevent interference between the two currents, and when the telephone company could use such a circuit by adopting a safe and inexpensive device, while the railroad company could do so only at a very great expense,

[1] 25 Amer. & Eng. Ency. Law 765.

[2] Nebraska Teleph. Co. *v.* N. Y. Gaslight Co., 27 Neb. 284. *And see* Keasbey on Electric Wires 142.

[3] West. Un. Tel. Co. *v.* Champion Elec. L. Co., 14 Cin. Wkly. Bull. 327.

[4] Cent. Pa. Teleph. Co. *v.* Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. Rep. 417.

and the question was practically as to which company should undergo the expense of such a circuit, the court denied the prayer for an injunction against the railroad company upon the following grounds: (1) that the railroad company was making a lawful use of its franchise in the manner contemplated by the statute granting it, and that such use cannot be considered as a nuisance in itself; (2) that in the exercise of such a franchise no negligence was shown, no wanton or unnecessary disregard of the rights of the telephone company; (3) that the damages occasioned to the telephone company were not the direct consequences of the construction of the electirc road, but were accidental damages resulting from its operation and were not recoverable.[1] In another case, where the line of a telephone company had been erected six years prior to the adoption by a street-railway company of electricity as the motive power under a single-trolley system, and where, in consequence of the trolley system, the telephone line was injured by the more powerful current of the electric railway escaping in large quantities and passing through the earth and the telephone lines, it was held that an injunction would lie against the electric-railway company, and that, as it appeared that the injury to the telephone company's lines could be prevented by the use of the double-trolley system, the injunction would hold. It was also held that the electric-railway company, though it had adopted a system which was the most efficient and economical, would not be permitted to employ it to the injury of the telephone company, particularly if such injury could be remedied by the electric company at less expense than the cost of changing the telephone company's system, and that, if both parties stood equal at law, the telephone company had the better equity by priority of time, because of the fact that it had employed electricity some six years earlier than the railway company.[2]

The use of terminal poles by a telephone company being the system heretofore adopted, the burden of showing that there is a better in general acceptance and reasonably adoptable by the company, so as to authorize the refusal of permits for further poles, is on the city.[3]

831. Electric-railway Lines and Telegraph and Telephone Circuits.— The foregoing case was practically overruled by the Court of Appeals, which held that when a company was authorized to construct and operate its lines upon streets and highways upon the express condition that they should not be so constructed as to incommode the public use, it was part of the company's compact with the State that the maintenance of its lines should not prevent the adoption of any safe, convenient, and expeditious mode of travel, such as the electric-railway system was shown to be; that the railway was occupying the streets in such a manner as to expedite public travel and permit the public use to which the streets were devoted; that the telephone company's franchise

[1] Cumberland Teleph., etc., Co. *v.* United Elec. R. Co., 42 Fed. Rep. 273. *And see* Hoyt *v.* Jeffers, 30 Mich. 181.

[2] Hudson Riv. Teleph. Co. *v.* Watervliet Tpk. & R. Co., 56 Hun (N. Y.) 68, 121 N. Y. 397, 61 Hun (N. Y.) 141.

[3] Commonwealth *v.* Warwick (Pa.), 40 Atl. Rep. 93 [1898].

was of a subordinate character, and that it could not complain that the electric-railway system adopted interfered with the operation of its lines; and it was therefore held, as in the decision of the United States court last cited, that the electric railway might operate its road by the single-trolley system, and the telephone company was left to protect itself from the ill effects of that system.[1]

It should be noted that herein was a circumstance not always existing in such cases, viz., that the telephone company was so to construct and operate its lines as not to incommode the public use; and it would seem that the case was reversed upon this condition. In this case both parties were making use of the earth as a return circuit, and the electric-railway company contended that it had an equal right with the telephone company to make use of its own property and of the laws of nature in the conducting of its business, just as all are entitled to the common use of air and light, which in a certain sense is undoubtedly true. The court, however, went on and said further that the electric-railway company "does not leave the natural forces of nature free to act, unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage. We are not prepared to hold that a person even in the prosecution of a lawful trade or business, upon his own land, can gather there by artificial means electricity and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business, or impair the value of his property, and not be held for the resulting injury."[2]

An injunction by a telephone company against an electric-railway company was denied by the court of Tennessee, but the latter company was required to execute a bond to indemnify the telephone company for any damages awarded against it.[3]

Where a telephone company had acquired a prior right to the use of the streets and had expended money on the strength of such right, the Ohio courts held that an electric-railway company had no right to disturb it unless it could be shown that there was no other way in which the latter company could enjoy its franchise to locate and operate an electric road.[4] The Superior Court reversed this decision for the reason explained in the preceding cases.[5]

[1] Hudson Riv. Teleph. Co. *v.* Watervliet Tpk. & R. Co., 135 N. Y. 393.

[2] Hudson Riv. Teleph. Co. *v.* Watervliet Tpk. & R. Co., 135 N. Y. 409, 410.

[3] E. Tenn. Teleph. Co. *v.* Chattanooga Elec. St. R. Co. (Tenn.), 30 Amer. & Eng. Corp. Cas. 562.

[4] City, etc., Tel. Co. *v.* Cincinnati, etc., R. Co. (Ohio), 23 Wkly. L. Bull. 165.

[5] Cincinnati, etc., R. Co. *v.* City, etc., Teleph. Assn., 48 Ohio St. 390. *And see* Wisconsin Teleph. Co. *v.* Eau Claire St. R. Co. (Wis.), Cir. Ct. of Eau Claire Co. [1890]; Rocky Mt. Bell Teleph. Co. *v.* Salt Lake City R. Co. (Utah), Dist. Ct. for 3d Dist. [1889]; East Tenn. Teleph. Co. *v.* Knoxville St. R. Co. (Tenn.), Ch. Ct. of Knox Co. [1890].

832. Complainant must have Exercised Care.—To be entitled to damages or to an injunction to prevent injury the complainant will be required to show that he has exercised reasonable care to protect himself and to prevent the injury, or that it could not have been prevented by exercise of reasonable effort on his part.[1]

In consequence of the development of electrical appliances and inventions the decisions upon questions of electricity and its control cannot be considered as even fairly well settled, and the development of electrical appliances and the effect upon the thousands of interests which prevail may require changes in the statements of the law as maintained and applied by the courts thus far and as set forth in the text.[2]

833. Telegraph Lines are Avenues of Interstate Commerce.—Like railroad and telegraph companies whose lines extend from one state to another, telegraph companies afford avenues of interstate commerce and are agents of the general government, in which capacity they are not subject to the jurisdiction of the state. The rule with respect to such lines is the same as that applied to interstate railroads. The state may not pass laws which interfere with the exclusive power of Congress over interstate commerce. This control which the Federal Government has assumed over telephone and telegraph lines, such as authority to operate such lines and to occupy military or post-roads, does not deprive a state of the power to require that in large cities all such lines should be placed underground in proper subways. Such a statute is a valid and proper exercise of the state's power of police regulation and cannot be allowed to conflict with the powers of Congress.[3]

A city council has no authority to pass an ordinance levying a license-fee for telephone instruments in the city which are used by a telephone company for the purpose of carrying on interstate business of the company.[4]

Laws in some states have been passed requiring that all electric wires and conductors in cities shall be placed underground in the streets, and be subject to the control of local municipal authorities. Such an act has been held constitutional and within police regulation, and as not impairing the rights of a corporation which had previously received permission from the city council to erect its wires.[5]

834. Telegraph and Telephone Companies Taxed.—By its power of police regulation and control over persons and property within its limits the state may impose taxes upon telegraph and telephone companies, and provide for the proper conduct of their business. It may determine the manner in which their lines shall be constructed and maintained, and exercise such general control as the public interests may require.

[1] Cumberland, etc., Teleph. Co. *v.* United Electric Co., 42 Fed. Rep. 273.

[2] *See* Keasbey on Electric Wires 152; Dill. on Munic. Corp. (4th ed.), § 734, *note.*

[3] 25 Amer. & Eng. Ency. Law 768.

[4] City of Ogden City *v.* Crossman (Utah), 53 Pac. Rep. 985 [1898].

[5] People *v.* Squire (N. Y.), 14 N. E. Rep, 820 [1888].

Under statute laws authorizing cities to collect a license-fee on various occupations, etc., a city council is authorized to pass an ordinance levying a license-fee of five dollars on each telephone instrument operated by a telephone company and used exclusively within the limits of the city for local business and for which a rental charge is made.[1]

[1] City of Ogden City *v.* Crossman (Utah), 53 Pac. Rep. 985 [1898].

CHAPTER XL.

RIGHTS OF WAY IN CONDUITS, PIPE-LINES, ETC., FOR WATER, OIL, AIR, GAS, AND ELECTRICITY.

841. Rights of Way for Subways and Underground Conduits.—Much that has been said in previous chapters of rights of way and of the interest of the public and of abutting owners in public ways could be repeated here under this subject of subways. In fact, if the reader has not read what precedes, or has not a fair knowledge of the principles of the law of property and of easements, he should make it his first business to inform himself in those particulars.*

Much that has been written on the subject of rights of way of roads, railroads, street railways, telegraph- and telephone-lines will shed light upon the subject of rights of subways. The reader should also review the subject of boundaries of ways and property in ways,† and what has been said with reference to the substances or materials which are conveyed or carried in subways.

The questions which arise most frequently in the construction and use of subways are those which arise from the occupation and use of public ways for a right of way; and the determination of these questions depends largely upon three conditions, which may vary in different localities. They are: (1) the purpose for which the subway is to be used, and whether or not it is a purpose incident to travel; (2) the ownership of the public way—whether the fee is in the abutting owner or in the state or municipality; (3) the powers granted to the party by the legislature either generally, as in a company's charter, or by the franchises conferred and acquired. These questions have been discussed at considerable length in preceding chapters. The courts of different states are not agreed upon any of them except, perhaps, the legislative powers conferred, which must be express.

In some states, if the purposes for which the subway is to be used render the street safer, better, and more healthful, it is held not an additional burden upon the highway, but a use incident to travel. Such subways are those for gas and electricity (and possibly oil) available or employed to light the streets; water-pipes from which water may be taken to sprinkle and clean the streets; sewers that may afford street-drainage, etc. These uses and purposes are held incident to travel even though they be also used for municipal purposes, as for

* *See* CONTENTS preceding chapters.

† *See* Secs. 441–460, *supra*.

the benefit and use of householders. A telephone and telegraph subway has been held not incident to street purposes even though it be used for police and fire service and incidentally for the maintenance of good order of the streets.[1]

A right to lay and maintain underground lines of pipe for the transportation of oil, gas, air, or water may exist in corporations created for public purposes, or such a right may be acquired by private persons or corporations by grant from landowners. Usually such rights of way are acquired and exercised by *quasi*-public corporations chartered for the purpose. The right to appropriate private property for the purpose of a right of way is a right conferred by the legislature, and the right to use public streets of a city for laying such pipe-lines must be exercised under authority of the legislature. To obtain such authority from the legislature the pipe-lines must partake of the character of a public use, and the determination of *what* is a public use rests with the legislature, subject to a limited review by the courts.[2]

The right of a gas company to use public highways for the laying down and operation of a gas-pipe requires a franchise which can be granted only by the legislature or by some local or municipal authority empowered to confer it. The right to lay gas-pipes in a country highway is not such a use of the highway as was contemplated at the time of its condemnation. There is a greater variety in cities of the uses to which such streets are put than in those to which country roads are put; and in cities the use of the streets for the laying down of gas-pipes is considered a legitimate use, subject, of course, to municipal regulation.[3]

842. Pipe-lines.—Corporations created for the transportation of fluids (petroleum, etc.) by means of pumping them through pipe-lines have been held to be engaged in a business of such a public nature as to have the right of eminent domain conferred upon them.[4] Some of the uses to which such pipe-lines have been put and which have been considered public uses are the following: the conduction of gas manufactured by a gas company;[5] the transportation and supply of natural gas; the transportation of oil in a pipe-line; the conveyance and supply of water; the use of electric conduits for the transmission of currents of electricity; and the use of pipes for conveying compressed air.[6]

The cases which do not regard such uses as public uses are where the companies have not been authorized to take private property. A private gas company has been held under no obligation to continue to supply its customers any more than are those who supply any other articles.

843. Pipe-lines in Public Ways—How Authorized.—Without express

[1] Whilcher *v.* Holland W. Co., 142 N. Y. 626, 48 St. Rep. 196. *See* 29 Amer. & Eng. Ency. Law 16, 24 *idem* 46, 114.

[2] Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242; 18 Amer. & Eng. Ency. Law 457, 458.

[3] *See* Bloomfield G. Co. *v.* Calkins, 62 N. Y. 386; Kelsey *v.* King (N. Y.), 32 Barb. 410; Mill's Eminent Domain, § 55.

[4] Lewis's Eminent Domain (1888), § 172. *And see* Turnpike Co. *v.* American, etc., News Co., 43 N. J. Law 381.

[5] Bloomfield, etc., Nat. Gas. Co. *v.* Richardson (N. Y.), 63 Barb. 437.

[6] 18 Amer. & Eng. Ency. Law 458.

authority a municipal corporation cannot grant exclusive rights of its streets for purposes of pipe-lines, and it is not settled in the courts as to how far a highway may be appropriated for the use of pipe-lines and other burdens without any compensation to the owner of the soil in the street. There are numerous cases which seem to hold that at least a country highway may not be used for the laying of pipes without the consent of the owner of the land.[1] Other cases hold that the owner of the fee in a highway is not entitled to compensation for the subjection of the highway to the additional public use of laying water-pipes under it.[2]

The laying out of an alley by the owners of adjoining lots along the rear of the lots, for the use of the several lots, has been held to make it subject to the same uses as a city alley, and the owners of the lots have the right to lay water-, gas-, and sewer-pipes along it.[3]

Injunction will issue at the instance of a township to prevent the laying of water-pipes in the township streets without its consent.[4]

The general authority given by public statutes to towns to lay out ways will warrant the construction by a town of a way along a strip already condemned by a city for the laying of its water-pipes, there being no act prohibiting it, and the use of the land for laying water-pipes being in no way inconsistent with the use for a way, and there being no material interference between such uses, and no probability that there will be any such interference.[5] An ordinance authorizing the construction of water-works by a city may provide for the laying of mains on streets in which a private water company has already laid mains.[6]

844. Subways Constructed under License.*—In Rhode Island it has been decided that the right of a gas company to lay pipes was an easement, not a license merely. Where a license was given to lay pipes it was held good until revoked by the owner of the land or his grantees; and that the employment, by such grantees, of another gas company to furnish gas through the pipes thus laid was not a revocation of such license even though such other gas company disconnected the pipes from the first company's main and connected its own main with them.[7] In Georgia a license to lay pipes on land has been held irrevocable after they are laid and expenses are incurred thereby; and a subsequent grantee of the land with notice is bound thereby.[8]

[1] Bloomfield, etc., Co. *v.* Calkins, 62 N. Y. 386. *And see* Boston *v.* Richardson, 13 Allen (Mass.) 160.

[2] Bishop *v.* North Adams Fire Dist. (Mass.), 45 N. E. Rep. 925. *And see* Boyer *v.* Little Falls (Sup.), 38 N. Y. Supp. 1114.

[3] Foran *v.* McIntyre (Pa. Com. Pl.), 26 Pittsb. Leg. J. (N. S.) 468.

[4] Inhabitants of Township of Franklin *v.* Nutley Water Co. (N. J. Ch.), 32 Atl. Rep. 381.

[5] City of Boston *v.* Town of Brookline (Mass.), 30 N. E. Rep. 611.

[6] Hughes *v.* Momence (Ill.), 45 N. E. Rep. 300.

[7] Providence G. Co. *v.* Thurber, 2 R. I. 15; Poughkeepsie G. Co. *v.* Citizens' G. Co., 27 N. Y. Super. Ct. 214.

[8] Rome G. L. Co. *v.* Meyerhardt, 61 Ga. 287; 8 Amer. & Eng. Ency. Law 1280, 1281; Tynon *v.* Despain (Colo.) 43 Pac. Rep. 1039.

* *See* Secs. 661–670, *supra*.

An abutting lot-owner who, under a license from a city, puts pipes under the surface of a street to conduct water from a spring on his land to his buildings on other land, and so maintains the same for 21 years, does not thereby acquire an easement by prescription, since his occupation of the street, being under license from the city, has not been adverse and, the pipes being under ground, has not been open and notorious as to the public.[1] When, however, the water company's right to convey water in pipes buried in the highway antedated the incorporation of the village and it did not appear that the fee of the streets was in the village, it was held that the principle that no prescriptive right in a highway could be obtained as against the public could not be invoked.[2]

845. Right to Enter and Open and Occupy Streets.—Municipalities cannot prohibit or prevent entry upon streets by water companies having the express and absolute right of entry by statute, but may only regulate the work with regard to grades and convenience of public travel. Such right will not be subject to the permission of the borough council unless specifically provided for in the creative act.[3]

If the franchise or charter be granted upon condition that the consent of the municipal authorities be obtained, it is not a perfected franchise until such consent has been obtained, and the right to occupy and open the streets is vested only when the consents required are obtained.[4] The question frequently arises as to who are the municipal authorities whose consent must be obtained when it is not expressed in the act.

846. The Act of Granting the Consent is Discretionary.—The city authorities may grant or refuse their consent, or may grant it upon such terms and conditions as they choose to impose.[5] The commissioner of public works cannot, by mandamus, be compelled to give permit to open street unless party has well-defined rights thereto. The exercise of such care and authority is discretionary.[6]

A gas company inhibited by its charter from digging up the streets of the city until the consent of the city government is obtained cannot be enjoined by a taxpayer of the city on the ground that the act of incorporation is void, that the right to grant permission to lay down pipes in the streets is vested in the city and is of great value, and if sold would realize a large pecuniary benefit to the city. The corporation of a city has an undoubted right to give permission to a company to lay down their pipes beneath the surface of the streets as a means of supplying citizens with an increased supply of gas.[7] They are not obliged to sell such permission or treat it as a part of the city

[1] Elster *v.* City of Springfield (Ohio Sup.), 30 N. E. Rep. 274.
[2] Boyer *v.* Little Falls (Sup.), 38 N. Y. Supp. 1114.
[3] Forty Fort *v.* Forty Fort Water Co. (Pa.), 9 Kulp 241 [1897].
[4] Matter of Rochester R. Co., 123 N. Y. 351.
[5] People *v.* O'Brien, 111 N. Y. 1.
[6] People *ex rel.* 3d Ave. *v.* Newton, 112 N. Y. 404.
[7] Smith *v.* Metropolitan G. Co., 12 How. Pr. (N. Y.) 187; Norwich G. Co. *v.* Norwich G. Co., 25 Conn. 24.

property which is to be used for purposes of city revenue. Nor is this power to authorize the laying down of gas-pipes a part of city property to which the corporate authority of the city is to resort for purposes of revenue.[1]

When necessary, a city may, in order to make improvements, disturb or remove railway tracks, pipes, and poles temporarily, although the use of the franchises be seriously interrupted for the time being. Such companies, like all others using the highways, may be required to submit to temporary inconvenience and delays for the sake of public advantage. It has been held that the construction of an underground street railway is not such a public work as will justify the tearing up of a railway already laid.[2]

The grant of a right to use the streets of a city on condition that the consent of the local authorities be obtained, which consent has been obtained, vests the company with the right to use the street as a franchise conferred by the state.[3]

When a franchise which is, in its nature, a contract and which does not reserve to the legislature the power of repeal is once acquired under statute, it cannot be divested by subsequent legislation.[4]

847. Property in Pipe-lines.—A company which owns a franchise to lay pipes for the purpose of transporting oil, gas, or water has two kinds of property therein, viz., (1) an incorporeal hereditament and easement in the land through which the pipes are laid, and (2) the property in the pipes, which is regarded differently in the several states. Some states regard the property in pipes as a fixture to the land by reason of the easement therein, and others as real estate pertaining to the main plant, and in yet others as personal property, and in Massachusetts, by statute, as machinery. In Rhode Island the nature of the property was likened to the right of a railroad company to build and occupy its road, or a canal company its canal under the provisions of its charter, which grants the power to take the land upon paying compensation to the owners.[5]

In England gas companies have, in different parishes, been held ratable as occupants of the land by their apparatus, pipes, etc., under statute, but a water company was held not liable to land-tax for the land occupied by its pipes.[6]

In a Rhode Island case[7] the question was thoroughly discussed, and in the New England states, Pennsylvania, and New York the pipes seem to be held to be fixtures, especially where the right of way has been granted by

[1] Smith *v.* Metropolitan G. Co. (N. Y.), 12 How. Pr. 187.

[2] West Phila. Pass. R. Co. *v.* Phila. (Pa.), 10 Phila. 70.

[3] Brooklyn *v.* Jourdon, 7 Abb. (N. C.) 23; Jersey City G. Co. *v.* Dwight, 29 N. J. Eq. 242.

[4] Brooklyn Cent. R. Co. *v.* Brooklyn C. R. Co., 32 Barb. 358.

[5] Providence Gas. Co. *v.* Thurber, 2 R. I. 15. *See also* Binney's Case (Md.), 2 Bland 145; Boston W. P. Co. *v.* Boston (Mass.), 29 Met. 202; Bishop *v.* North Adams F. D. (Mass.), 45 N. E. Rep. 925.

[6] 18 Amer. & Eng. Ency. Law 459.

[7] Providence Gas Co. *v.* Thurber, 2 R. I. 15.

deed in fee. The pipes being annexed to the freehold, and a gas company having an easement in fee, the pipes are held to be fixtures, and therefore they may be rightfully assessed as real estate.[1]

In Iowa the land, machinery, and water-mains of a water company were held to be real estate and appurtenant to the water-works or main structure even though the pipe-lines were not laid upon the lots owned by the company, and even though they extended into other townships. It was argued that the pipe-lines acquired their real-estate character by being appurtenant to the water-works, and that they would pass as incident to the principal thing in a conveyance of the works without any conveyance of the land where they were located; and that no easement was required except in the place where the water-works and lots were situated.[2]

In New York state the pipes of a gas company running under the streets of a city, not being erected upon or affixed to the company's land, were held not real estate under the statutes for the purpose of taxation,[3] but since May, 1899, they are, by special act of legislature, to be taxed as real estate. It was also held in another case that incorporeal hereditaments were not subject to taxation as land or real estate.[4] These are cases involving a question as to whether such pipe-lines should be taxed, and to-day the law does not seem to be well settled.[5]

The right to bring water through pipes across the grantor's lands is such an interest in lands as requires the deed of grant to be subscribed, sealed, and acknowledged or attested.[6]

848. Grants of Exclusive Use of Streets for Subways.*—A city may not grant exclusive use of the streets for laying gas-pipes without direct authority from the legislature.[7] The legislature may, however, in effect grant the exclusive privilege to a gas company to furnish gas to a city for a term of years by a general grant of power to cause such city to be lighted with gas. While the grant carries with it by implication all such powers as are necessary for the proper and convenient exercise of the authority expressly conferred, it does not authorize the city council to grant an exclusive right to use the streets of the city for the purpose of laying down gas-pipes for a term of years or thereafter until the works shall be purchased from the grantee by the city. A power to a city to light the city would authorize a contract for gas, and would give the city power to grant the contracting party the use of the streets, but not authority to give exclusive use for a definite period.[8]

[1] 18 Amer. & Eng. Ency. Law 460. *See* Franchise Tax Law,—Laws of New York, Extraordinary Legislature, May, 1899.

[2] App. of Des Moines W. Co., 48 Ia. 324. *And see* Capitol City G. Co. *v.* Charter Oak Ins. Co., 51 Ia. 31.

[3] People *v.* Bd. of Assess., 39 N. Y. 81.

[4] Borrell *v.* Mayor (N. Y.), 2 Sandf. 552.

[5] 18 Amer. & Eng. Ency. Law 461 *and references.*

[6] Nellis *v.* Munson (N. Y.), 15 N. E. Rep. 739 [1888].

[7] 8 Amer. & Eng. Ency. Law 1277 *and cases cited.*

[8] 8 Amer. & Eng. Ency. Law 1278–1280.

* *See* Secs. 792, 795, 819, *supra.*

Neither is such contract objectionable or invalid by reason of the stipulation that the city would not during its term erect water-works of its own; there being no attempt thereby to create a monopoly, and the city reserving the right therein to take, condemn, and pay for the works of the company at any time. Taking into consideration the nature of the contract, the large expenditure which it involved on the part of the company, and the ruinous effect on its property which the direct competition of the city would necessarily have, such provision is a lawful incident to the principal contract, and amounts to little more than an agreement that the city would carry out the contract on its part in good faith, and, if it should desire to establish water-works of its own, would not enter into such competition.[1]

Under an act of the legislature[2] empowering a city to grant the right to erect and operate water-works for the use of the city, provided that at the expiration of the twenty years the city should purchase the works, if the grant should not be renewed, and, if the price could not be fixed by agreement, pay therefor the fair and equitable value, an ordinance was passed by the city and a contract was made under which the works were erected by a water company, which provided that on a failure to renew the grant, at the expiration of twenty years, the city should purchase the works. It was held that the provision for purchase was mandatory if the grant was not renewed.[3]

A right to carry and conduct under lands, and therein to construct, operate, and forever maintain, an underground main sewer and connecting sewers, drains, manholes, and underground appurtenances, and to repair and renew the same, does not include the right to remove the soil from one part of the system to another in repairing and renewing such sewer.[4]

849. Care of Subways. — Negligence. — Plaintiff owned greenhouses situated on the westerly side of a street. Defendant gas company's main pipe lay along the easterly side, and a service pipe, crossing the street under the rails of an electric street railway, connected it with a street-lamp in front of the greenhouses. The service-pipe was corroded by natural causes, or eaten away by electrolytical action, and allowed gas to escape; but, the ground being frozen, the gas percolated through the soil under the frozen crust till it reached the greenhouses, and then came to the surface and destroyed the growing plants within. There was a conflict of evidence on the question whether the time since the pipe was laid was in itself long enough, under the circumstances, to call for an inspection of its condition. It also appeared, without contradiction, that prior to the freezing of the ground there had been a strong smell of gas in the street at that point. It was held that the evidence warranted a finding of negligence on the part of defendant in failing to examine the pipe.[5]

[1] City of Walla Walla *v.* Walla Walla Water Co., 19 Sup. Ct. Rep. 77 [1898].
[2] Laws of Missouri, March 24, 1873.
[3] National W.-w. Co. *v.* Kansas City (C. C. A.), 62 Fed. Rep. 853.
[4] Butchers' Ass'n *v.* Commonwealth (Mass.), 47 N. E. Rep. 599 [1897].
[5] Siebrecht *v.* East River Gas Co., 47

850. Measure of Damages.—On an appeal from an award of damages for the appropriation of an easement in land for the laying of natural-gas mains, the jury should consider the relation of the remainder of the farm affected to the part condemned, the fact that the owners were deprived of the privilege of improving certain portions of their land, and the liability of the soil and crops to injury by leakage.[1]

In an action for damages to land used for farming purposes, resulting from the construction over it of a pipe-line, it is competent, in estimating the injury to the property as a whole, to show that part of the land is ripe for building improvements.[2]

851. Other Rights of Way.—There are perhaps other rights of way or uses that may be met in construction work which have not been specially considered in this book, but the author feels that the discussion of those that are treated will enable the reader to determine safely the rights and liabilities existing under such rights so far as may reasonably be expected of him. In case large interests are involved the engineer or architect or contractor or builder or public officer would of course consult competent counsel at law. It is out of the question in this short work to undertake to go very far into the law upon the topics herein treated, which is almost boundless in its extent and embraces so many different subjects.

N. Y. Supp. 262, 21 App. Div. 10. *And see* Sherman *v.* Fall River (Mass.), 2 Allen 524; Jutte *v.* Hughes, 67 N. Y. 267.

[1] Manufacturers' Natural Gas Co. *v.* Leslie, 49 N. E. Rep. 946.

[2] Railroad Co. *v.* Cleary, 17 Atl. Rep. 468, 125 Pa. St. 442, *distinguished;* Wilson *v.* Equitable Gas Co. (Pa. Sup.) 25 Atl. Rep. 635.

PART V.

FRANCHISES.

CHAPTER XLI.

CHARACTER AND KINDS OF FRANCHISES.

861. Character of a Franchise.—A franchise is a special privilege granted by the government to individuals and one which *does not* apply to the citizens of a country in general and by common right. A franchise must have been granted by the sovereign authority, and no franchise can be held which is not derived from a law of the state. At common law a franchise was made a branch of the king's prerogative subsisting in the hands of a subject; but this idea of a franchise has been modified to agree with the modern prerogatives of constitutional government.

It is a duty of a government to provide and maintain highways, bridges, and ferries, to supply water and gas, and to make in various other ways provision for the comfort and convenience of the public. These duties are not always assumed by the government, but are sometimes delegated to its citizens. As an inducement for the latter to undertake such duties, more or less exclusive privileges are granted. These privileges are the most common form of modern franchises, and they are usually granted to corporations for good business reasons. The power and duty of a government in granting a franchise does not end with the mere matter of business policy; and while the corporations created for public purposes may constitute a minority in the many corporate enterprises of to-day, yet the objects for which corporations are created are universally such as the government wishes to permit. They are deemed beneficial to the country, and this benefit constitutes in most cases the sole consideration of the grant.

862. Public Character of Corporations.—The tendency of to-day is to lose sight of the public character of a corporation, and the result is to obscure and render difficult of application the principles of corporation law. A

powerful railroad corporation endowed with valuable franchises and subject to important public duties is not likely to be regarded in the same light as an ordinary manufacturing company. Early legislation regulated the formation and control of corporations in a liberal manner. The aggregations of capital materially aided in developing the resources of a new and growing country. Special charters were granted which conferred valuable franchises in generous terms, and the immediate and future interests of the state were not foreseen and guarded as might have been expected under other circumstances. The law of earlier decisions reflects this influence. The law of the present day shows a new and conservative policy, which in some states reaches the opposite extreme. Constitutional provisions in many states now prohibit the incorporation of companies by special acts, but the general laws regulating the formation of corporations admit of their creation for almost any lawful purpose. Almost all of the early liberality of legislatures has disappeared from the later statutes affecting corporations. This change has brought about more or less conflict in the law of corporations, and much of this conflict may be explained by this change of relation of corporations to the state creating them. Certain corporations having been invested with such powers and franchises as the right of eminent domain, and having received state or municipal aid or having been created for public purposes, they have become agents or trustees of the state as to the property secured by the exercise of their powers conferred.

There is a distinction between a franchise of a corporation and the powers of such corporation. To be a *franchise* the right possessed must be such as cannot be exercised without the express permission of the sovereign power; that is to say, a privilege or immunity of a public nature which cannot be legally exercised without legislative grant. The right to carry on any particular business, whether belonging to a natural or an artificial person, is not necessarily or even usually a franchise. The right to carry on a particular business by a corporation organized under a special charter or general law is not a *franchise* but it is a *power*, provided that such business may be conducted by any citizen, who chooses to engage in it.

The right to build, own, manage, and run a railroad, and take tolls thereon, is not, of necessity, of corporate character or dependent upon corporate rights. It may belong to, and be enjoyed by, natural persons. A distinction is made between the franchise and other property acquired by it. A franchise is incorporeal.

The fact that a corporation is charged with certain public duties which are not imposed upon all does not change its character as a private corporation. Private and public or *quasi*-public corporations are distinguished in several ways. The former should be distinguished from corporations having certain franchises or engaged in business in which the public have an interest. The public relations of private corporations arise from the acceptance of the

franchises, the grant of which constitutes a contract binding them to the performance of various public duties for which the franchise itself is the consideration. Another class includes those which have engaged in business of such a nature as to require regulation by law.

Corporations which are required to perform various public duties are railroad, telegraph, telephone, turnpike, canal, railway, water, gas, and electric companies, which have received their franchises with the right of eminent domain, municipal aid, exemption of taxation, the monopoly of carrying on their business to the exclusion of others, or other grants which amount to the legal permission to assume certain public relations from which the public in general is debarred. In such companies the public has more or less interest, which justifies laws regulating rates of freight and fares, charges for service, prices of water, gas, etc., the fixing of tolls, and otherwise providing for the comfort and safety of passengers and patrons.[1]

Corporations are frequently subject to certain other regulations for public safety, morals, and convenience, by the police power of the state. Instances where corporations have been incorporated and subsequently subjected to police regulation are those regulating the manufacture and sale of intoxicating liquors, the maintenance of lotteries, fertilizer maufacturing companies, etc.

863. Franchise of a Corporation.—Subject to the restrictions of its constitution, the state legislature alone has power to create corporations and to endow them with franchises. A state may confer upon a corporation any privileges it pleases excepting those which the constitution prohibits. The charter of a corporation is itself a franchise, though it include very valuable privileges. If granted unconditionally, it constitutes a contract and prevents further legislative interference with the privileges conferred, and possesses a value which is seldom attached to a franchise of to-day. In most of the states the constitution prohibits the legislature from creating corporations by special charter and state constitutions, or general laws reserve to the state the right to amend or repeal all charters of private corporations.

Corporations may be formed by general incorporation laws to engage in almost every variety of business enterprises, and the process required by these statutes is so simple as to enable a corporation to be created with little trouble and expense. The corporation of to-day has therefore lost its chief element of value in the fact that a corporate charter is not an exclusive privilege, but may be acquired by anybody with little difficulty. The right to be a corporation is a franchise because it is a grant from the government and a special privilege to do that which would be unlawful otherwise.

All powers and privileges which a corporation possesses are derived from this franchise or charter, and whether they be named in the charter, or held by judicial construction of its terms, or read into its charter, or implied by law from the grant of the charter franchise, the charter is nevertheless the

[1] 8 Amer. & Eng. Ency. Law 591.

measure of the power of authority of the corporation. If the charter creating a corporation be right itself, and all the powers of the company be derived from it, then it follows that all the lawful acts of the corporation must be within the meaning of its terms. This principle is well established by the cases; and however vague an idea may be conveyed, the ordinary use of the word "franchise," as applied to a corporation, is in reference to the right given by law to be a corporation, and, also, to the numerous and often ill-defined powers derived from the same source. The first-named franchise, i.e., the right to exist as a corporation, has usually little or no value and therefore many of the powers which depend upon it are no longer franchises of consequence. The powers which are granted to corporations and which constitute the chief value of the charter have been affected but little by changes in the law. These are certain extraordinary privileges sometimes granted to corporations, which stand in a peculiar relation of duty to the public, and which are of much prominence and importance as franchises. Some of these powers are the following, viz., eminent domain, exemption from taxation, municipal aid, and a right to a monopoly.

864. Power of Eminent Domain.—The right of eminent domain would be a franchise of no value to a corporation unless it was formed for public purposes, because it is a power of the government which could not be delegated except for public purposes. In every franchise there is an implied reservation to the state of the right of eminent domain. It is regarded as so important and essential an element of sovereignty that no legislation can bind the state to an agreement that it shall not be exercised. Franchises of corporations, like other contracts or property, are subject to appropriation by the state by right of eminent domain, and with no further restrictions than apply in all cases, i.e., that the condemnation shall be for public use, and that it is only authorized upon making just compensation to the owner.

865. Right of Exemption from Taxation.—Other franchises which are limited strictly to public purposes are those which exempt property from taxation. This exemption from taxation can never be implied, but must be granted by clear, unequivocal, and valid contract. If the franchise of exemption from taxation be lawfully granted, it becomes a contract the obligation of which cannot be impaired by future legislation.[1]

It has been declared that the exemption of a corporation from taxation is not a corporate franchise, but such a statement involves a serious contradiction of all the best authorities in the definition of a franchise. If such an exemption do not constitute a franchise, it is not easy to see what would come within the terms of the accepted definition. A writer upon the subject in the American and English Encyclopædia of Law expresses the belief that those decisions which declare that it is not a franchise are upon the doctrine that in the creation of such franchises the strict rule of construction applies to all

[1] 8 Amer. & Eng. Ency. Law 596.

grants in derogation of common rights, according to which only those rights may be included as are essential to the existence and purpose of the corporation.

866. Right to Municipal Aid.—Another grant of a franchise to corporations is that of municipal aid. This is sometimes in the form of a donation of property, but is usually granted by authorizing subscriptions to the stock and bonds of the railroad by the state or the counties, cities, or towns through which the grantee of the franchise is to operate its lines or works, and which are to be directly benefited by such works.

The only ground upon which such franchises are held to be constitutional is that the taxation by which the money is raised is for a public purpose because it is used to accomplish public ends. The constitutions of a number of states, as amended, now expressly prohibit the grant of such franchises.

867. Right to a Monopoly.—The most valuable and most common of modern franchises are those which give exclusive privileges or monopolies. Such franchises are common even though the constitutions of many of the states prohibit the grant of such franchises except for purposes which are strictly public. There are many things of such importance to the development, comfort, and general welfare of communities that a grant to corporations formed for public purposes is not objectionable even though such privileges are exclusive. Such are electric, gas, and water companies to which is given the exclusive right to supply cities and towns; and such also are other corporations endowed with like franchises or with such others as more or less exclude competition by the very nature of the franchise bestowed.

A large number of corporations are brought into no such relations to the public as require the discharge of public duties, because the obligations of the company usually come from an acceptance of the franchise granting corporate rights or from those obligations to exercise the ordinary powers or franchises which accompany it. Unless the business in which the corporation is engaged be such that the public interests require its regulation, such a company is free to conduct its affairs in practically the same manner as individuals or partnerships. The same principles do not apply to those corporations which have accepted the unusual and valuable franchises already referred to in detail, and which may, like individuals under the same circumstances, select a business which, from its nature, subjects them to a further responsibility to the public.

868. Contract Obligations of a Franchise.—It is well established that the grant of a franchise, in the charter of a corporation, constitutes a contract the obligation of which cannot be impaired by subsequent legislation. The law has been the subject of much criticism, but the force of the objection to it is grounded chiefly upon theory. The rule has withstood all attacks, but the force of the law has been changed by explanation and by legislation. There are two other equally well-settled principles of the law which have had the effect to almost nullify the rule stated. The first of these principles is

that every grant of a franchise that is in derogation of common right will receive a strict construction; and the second, that every charter and the grants it contains is accepted subject to the police power of the state, which may not be granted away. In addition to these two rules or principles of construction the state constitutions and general laws, or even the charters themselves, usually reserve the power to amend or repeal the charters of all private corporations.

However, the rule of law is as stated, that a franchise constitutes a contract which may not be impaired by subsequent legislation, and it has protected many franchises of corporations, of which the following are some examples, viz.: lawfully granted monopolies; donation of an annual sum to a college; exemption from taxation; right to charge more than the usual rate of interest; the right of eminent domain; the right to fix a tariff of charges on a public road; the right to form a new corporation by consolidation with another company; and the exemption of a company's servants from the duty of serving upon juries or of working upon roads.[1]

Most charters contain various provisions which are matters of general law and not of contract, and are therefore subject to modification and repeal. The legislature may validate a contract not within the company's franchise. There are numerous ways in which questions arise as to how far individual rights of stockholders can be affected by the legislature without impairing the obligations of contracts.

869. Franchises are Granted Subject to Police Power.—The doctrine that a grant or franchise is a contract has been frequently raised in efforts to protect corporations from the operations of law passed in pursuance of the police power of the states. It is well settled that the legislature cannot bargain away the police power of the state; and while irrevocable grants of property and franchises may be met with, they do not impair the supreme authority to make laws for the right government of the state. No legislature can curtail the power of its successors to make such laws as they may deem proper in police matters. Therefore corporations are subject generally to remedial legislation, like individuals. The state may impose penalties upon corporations for not performing their public duties. A railroad company may be controlled in the matter of freight rates and fares; or as to the operation of its trains; as to its liability to laborers and contractors constructing the road; as to negligence causing death; as to fences, cattle-guards, and other improvements; as to stopping before crossing a drawbridge; as to viaducts at crossings; or as to sign-boards, flagmen, speed, whistling, and bell-ringing, and numerous other matters of a similar character.

When the public safety or public morals require it, the legislature may abolish or discontinue a business, and corporations formed for the purpose

[1] 8 Amer. & Eng. Ency. Law 620.

of carrying on such business may be required to discontinue the objectionable operations.

A city cannot, by a contract which permits a telephone company to construct and maintain its line upon a certain street, deprive itself of the power to enact such legislation as is necessary for the general welfare; and an ordinance modifying such permission, or requiring the removal of the line to another location, cannot be held unconstitutional, as an impairment of the obligation of the contract, where it is designed for the public safety and convenience.[1] The same applies to a business the continuation of which may become a nuisance. So, too, the monopoly secured to the inventor in the patent of an article does not prevent the operation of such police laws.[2]

It has been held that the obligation of corporate contracts in grants or franchises was not impaired by legislation which regulated the working-hours of minors and women, or punished neglect or misconduct in the management of a ferry, or regulated the price to be charged for water and gas, or interrupted the business of a corporation which had become injurious to public interests.[3]

870. Franchises which are Subject to Legislation Affecting Remedies.— Another class of legislation which has been attacked as unconstitutional is that which alters the legal remedies by or against corporations; the constitutionality being attacked upon the ground that the grant of franchise constitutes a contract. It is well settled that the remedies for the security of this right and those by which liabilities are enforced as to the mode, the time when, and the courts in which they should be enforced are not placed beyond legislative control, but that they are inalienable. This principle has been held where a three years' limitation in a railroad charter as the time within which suit for damages for land taken might be brought was extended; also where a summary remedy against defaulting stockholders was given by charter and was subsequently altered, and where a charter provision against summary process by execution in the nature of an attachment against debtors upon notes is no part of the corporate franchise and may be repealed or altered.[4]

It has been held that a different rule for service of process against a corporation from that in force at its creation may be prescribed. A special remedy given to a railroad company for condemnation of land may be repealed in a general statute applying to all railroads. There is no element of contract in the special remedy.[5]

The word "person" has been held to include artificial as well as natural persons unless the language indicates that it is used in a more restricted sense. Statutes referring to persons may also apply, it seems, to corporations,

[1] Michigan Tel. Co. *v.* Charlotte (U. S. C. C.), 93 Fed. Rep. 11 [1899].
[2] State *v.* Telephone Co., 36 Ohio St. 296.
[3] 8 Amer. & Eng. Ency. Law 623, 624.
[4] 8 Amer. & Eng. Ency. Law 624, 625.
[5] 8 Amer. & Eng. Ency. Law 625.

and the question is one of proper construction of statutes. Corporations have been held to be included within the terms and statutes which apply to the following subjects: promissory notes; tax laws; statutes protecting lands of persons from trespass or giving remedy for damages caused by the exercise and power of eminent domain; laws prohibiting persons from doing banking business, or imposing liability in damages for injuries causing death, or prohibiting contracts between municipalities and persons as to supplying gas. On the other hand, corporations have been held not to be included within the terms of United States confiscation acts or of statutes applying to the formation of corporations. Under the statute of Anne a state is a corporation which may be the payee of a promissory note. Corporations have been held not to be within certain tax laws or statutes to prevent nuisances, or prescribing penalties for fraudulent claims against the government, or prescribing penalties for employing minors more than a certain number of working-hours, or as being liable for larceny for taking the logs of another.[1]

871. The Right to Amend or Repeal Charters Reserved.—One of the most important subjects to consider in the study of franchises is the right of the state to amend or repeal them. It has been held that unless such a right has been reserved in the grant of the charter, or unless the right to grant franchises unconditionally has been denied by the constitution of the state, when a franchise has been granted it may not be amended or the rights thereunder taken away without impairing the obligations of the contract, which is contrary to the constitution of the United States and of many of the states. At the time that the earliest franchises were granted in this country the complications which have arisen from the grant of franchises and the exclusive and vested rights under them were not anticipated. It was not until the famous Dartmouth College case was decided that the attention of the courts and legislatures was brought to the monopolies which might be created by the grant of franchises if the right was not reserved to amend or repeal them. Judge Story, in his opinion in that case, suggested the desirability of reserving such a right to amend and repeal charters. This right is now reserved in almost all charters and franchises, and in many states the power of legislatures to grant franchises which cannot be amended or repealed has been taken away by constitutional amendment. The evident purpose of such reservations is to prevent corporations from acquiring contract rights which may not be amended or modified when the interests of the public seem to require it. The doctrine which aims to prevent the acquisition of such rights has been criticised and its scope and bearing have not been fully appreciated. The reasoning upon the reserved power is likewise often obscure. The decision of many questions which arise in the construction and determination of the powers and rights of corporations which are *quasi*-public, such as railroads, water companies, etc., must depend upon the interpretation of rights of the

[1] 8 Amer. & Eng. Ency. Law 626, 627.

companies under their franchises or charters. It therefore becomes an important question to the company which has invested large sums of money under a charter or franchise whether or not the money invested under such a charter or franchise is safely invested, and whether the rights acquired, which rights may have been the chief inducement for the investment of such large sums of money, are safe, or whether the legislature can at its own will make such changes in the charter or franchise as will render the property valueless or as will largely depreciate the stocks and bonds of the company.

It will not require special effort on the part of engineers, contractors, or business men who are engaged in promoting enterprises to recall instances in their own experience in which large sums of money have been invested under the charter or franchise of a company, which investment would be rendered well-nigh valueless if the legislature were permitted to amend or alter the charter of the company so as to destroy important features of the franchise.

In some jurisdictions it has been held that when the power to amend or repeal a charter or a franchise has been reserved, the effect of it is to reserve to the legislature exactly the same power of control over other charters that it would have had if the constitutional provisions protecting the obligation of contracts had not existed;[1] and that such a reservation prevents the powers of franchises conferred in the charter from becoming contracts, though they do constitute grants by the legislature.

Other provisions of the federal and state constitutions may protect and secure from legislative interference many valuable features of such grants; and a right to amend or repeal franchises and charters granted cannot be construed so as to permit the legislature to change them. Constitutional limitations upon legislative authority would prevent any attempts made in this way to alter or amend vested rights the same as in any other case. Without regard to any question of the obligation of contracts contained in charters, the right of legislative interference with the rights of corporations should be measured by the public interest in those affairs. If judged from this standpoint, *quasi* public corporations must come in for the largest share of control. In many acts of other classes of private corporations the public has no interest whatever, and an attempted legislative interference which would be valid in the first case would be invalid in the second.[2]

The effect of such a reservation of power to the legislature to amend or repeal the charter of a company is shown in a case decided in Rhode Island. The legislature passed a law which required employers to pay their employees on the day of their discharge all wages earned by them without abatement or reduction, and providing a penalty for their failure to pay as the statute required. The court held that so far as natural persons were concerned the

[1] *See* Sinking Fund Cases, 99 U. S. 700.

[2] 8 Amer. & Eng. Ency. Law 628.

law was unconstitutional because it had the effect of impairing the obligation of contracts and of limiting the right to contract, but that in respect to a corporation, whose charter the legislature reserved the power to alter and repeal, the constitution was not violated; that all the powers a corporation has are created and granted by the legislative authority, and that by accepting the charter the company agreed that they might be amended according to law. The Rhode Island court even went further and held that the power of a corporation to contract, granted by its charter, was not such a property that the act of the legislature in modifying or limiting it could be called a taking away of the company's property without compensation.[1]

An act exempting city water-works from taxation so long as they should be unproductive was held not to give a contract right, so as to prevent its repeal by the constitution.[2]

If the power to amend, alter, or repeal the charter be reserved, it is evident that there was *no* intention to make the grant of certain franchises an irrevocable gift. Belonging to this class are those franchises which exempt the company's property from taxation, or which confer the right to fix such charges as a railroad company shall deem reasonable, and in general all rights, privileges, and immunities derived by the company's charter directly from the state.[3]

Whatever rights, franchises, or powers owe their existence to the granting clause of the charter are lost when it is repealed. Therefore the legislature may make any alterations or amendments of a charter granted which will not defeat or substantially impair the object of the grant or any rights which are vested under it and which the legislature shall deem necessary to secure either that object or any public right.

There are many things relating to the public duties of corporations, such as transportation companies, telegraph and telephone companies, water, gas, and electric companies, and other companies, which, by reason of the right to amend or repeal being reserved, are made peculiarly subject to legislative control and are freed from any question of an obligation of contract contained in their charters. It is not, however, necessary that the right to amend be reserved in order that such right may be exercised and sustained. The doctrine that the police powers of a state cannot be bargained away is so universally accepted that the legislature may exercise such a control over such corporations in many cases. Where such a reservation has been made, it has been held that a railroad company might be required to build a double track and station-house, or to change its grade and alter its bridges for purposes of safety and convenience. It may be compelled by general or special laws to make changes in the level, grade, and surface of the roadbed, or to erect

[1] State *v.* Brown, etc., Mfg. Co. (R. I.), 39 Amer. & Eng. Corp. Cas. 190 [1892]. *And see* Wait's Engin. and Arch. Jurisp., Sec. 144.

[2] City of Newport *v.* Commonwealth (Ky.), 50 S. W. Rep. 845 [1899].

[3] 8 Amer. & Eng. Ency. Law 628.

new structures and crossings over another railroad or of highways, or to build station-houses at particular places and in a particular manner. It has been held that the legislature may prescribe by whom, in what manner, and under whose supervision the work required to make changes of grade, roadbed, etc., should be accomplished, and in what proportion, according to their respective interests, it should be paid for by the parties affected. Railroad companies have also been required to make extensions of their lines, to make new connections, and to consolidate with other companies; provided, however, that in none of these instances a material change in the purpose of the corporation or an interference with the rights of individual stockholders is effected.[1]

Under such a reserved power it has been held that the legislature may vary the measure and thus enlarge the proportion of the profits which a mutual life-insurance company is required by the terms of its charter to pay to a charitable institution. Likewise various legislative acts have been sustained which have increased the liability of the stockholders.

872. Power to Amend and Repeal Limited.—It is well settled that the power of the legislature to amend and repeal franchises of charters is limited. Such a power is not arbitrary and does not authorize a material change in the corporate enterprise so as to work a wrong under the guise of an amendment. The legislature cannot impair the vested rights of stockholders. Their interest in the corporate property may not be annihilated by the repeal of the charter. Power is vested in the courts to protect those interests. Though the consent of the corporation may not be necessary to the repeal, yet under the power reserved to the legislature an alteration cannot be enforced upon it until accepted by the corporation, or at least by a majority of its stockholders.

873. Limitation as to Property and Contracts.—When rights under a charter have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested in the legitimate exercise of the powers granted. Direct legislation by which a state could appropriate property which was the subject of the grant in the charter or acquired under it would be unconstitutional, and such an authority obtained through a reservation in the charter would be equally so. Personal and real property accumulated by a corporation during its lawful existence, rights secured under contracts, or choses in action so acquired and which do not from their nature depend upon the general powers conferred by the charter, may not be destroyed by such a repeal. The courts may, if the legislature does not, provide some special remedy and enforce such rights by the means in their power. Mortgages made under powers originally granted cannot be vacated; debts contracted cannot be released. The reserved power authorizes the state to provide for the due performance of contracts already entered into. The legislature may not establish rules in regard to the management and disposal of the assets of a corporation so that they shall be diverted

[1] 8 Amer. & Eng. Ency. Law 630.

from, or divided unfairly and unequally among, the creditors and thus impair the obligation of contracts, nor so that a part of such assets which properly belong to the stockholders shall be diverted and thus injure vested rights.

Thus while the power of Congress over waterways connected with the great rivers of the country is supreme whenever it chooses to exercise the same, yet, before it has acted, the legislative power of the state within whose borders the stream flows is competent to charter a corporation to improve the same, and to give it a franchise to collect tolls. A franchise thus granted is a vested right, and if Congress thereafter, by condemnation, takes such improvements, it is bound to make just compensation for the value of the franchise, as well as for the physical property taken.[1]

A reserved right to amend or repeal when once exercised is not exhausted. It may prevent the grant itself from becoming what it otherwise would become, i.e., a contract with the state. A charter with such a provision becomes a mere privilege subject at any time to be withdrawn or modified at the will of the legislature. Sometimes this right to repeal or alter is reserved by a constitutional provision, and at other times by general statute in force at the time the corporation was created. The question as to whether under the reserved power the reservation is wise, or one consistent with public interest or the interest of the company, is for the legislature, and not to be determined by the courts. It cannot be presumed that the legislature exercised the power arbitrarily or unjustly. When the right to repeal the charter on the happening of a certain event is reserved to the legislature it may enact the repeal whenever the event happens without first invoking the judgment of the court. If the exercise of a reserved right depend upon the misuse or the abuse of the franchise, the authorities are not decided as to whether the legislature shall determine the fact or whether it shall first be determined by the courts.

874. Mortgage Sale and Transfer of Franchises.—The franchises of many corporations are practically of no value, and therefore the question as to the power of selling and mortgaging such franchises does not often arise. If the franchise of a corporation be valuable in itself or be conferred with subordinate franchises having more or less the character of monopolies, it will usually be found to have been granted for public purposes, and to require the performance of certain public duties for which the corporation will be held responsible. The cases which involve the right to transfer franchises relate chiefly to matters similar to the foreclosure of railroad mortgages, which mortgages cover not only the corporeal property, but also the franchise of the company. The right to alienate franchises refers to such mortgages as cover not only tangible property, but the franchises, and to other means of transfer of the franchises of railroads and other corporations of a *quasi*-public charac-

[1] Monongahela Navigation Co. *v.* United States, 13 Sup. Ct. Rep. 622; Bridge Co. *v.* U. S., 105 U. S. 470, *distinguished.*

ter. Whether or not the doctrine will be confined to this class of *quasi*-public corporations is not fully determined, but it is a settled rule supported by the weight of authority that a corporation cannot mortgage, sell, or transfer its franchises unless expressly authorized by the legislature to do so. The rule is not universal, but it is generally held that when a franchise is conferred upon a corporation the legislature considers the character of the grantee and the restrictions which it places upon the corporation, and that therefore such corporation cannot do anything which shall amount to a renunciation of its duty to the public, or directly and necessarily disable itself from performing it; that it cannot, therefore, convey away its franchise and corporate rights. If a company be granted a charter or franchise intended in a large measure to be for the public good, the due and proper performance of its duties is the consideration of the grant, and therefore any contract which disables the corporation from discharging its functions by seeking without the consent of the state to transfer its rights and powers to others, and to relieve itself of the burdens which the charter imposes, is a violation of the contract with the state, and is therefore void as against public policy.[1]

In determining the right to alienate a franchise the terms in which the authority is given must be regarded, and the vital part of the transaction is the law under which it is made. Sometimes the charter or general laws contain express authority to mortgage or alienate franchises as well as other property, but even in such cases the literal transfer of a franchise is never executed. Depending upon the power conferred, such a sale may amount to a complete or partial surrender of a franchise and to the investing of the transferee with corporate powers, such as the terms of the grant indicate shall be conferred. Thus when a special statute undertook, upon a sale of a mortgage given by a railroad company, to invest the purchasers with corporate capacity and to authorize them to reorganize, create new stock, and elect a new board of directors, this was held to be in effect an original act of incorporation. Even though the transaction be declared to be a transfer, sale, or conveyance of a franchise to be a corporation, it only amounts to a surrender of the old charter and a new grant to the transferees with similar privileges, as when general statutes provide that the purchaser of a railroad under foreclosure of the mortgage may create a new corporation and thus practically succeed to all the franchises of the old company, including the right to be a corporation.[2]

A transfer of a franchise by a corporation if made without legislative authority may be ratified by subsequent enactment of the legislature, and such ratification is held to constitute a grant of the franchise. Under the terms of a power to transfer, an alienation of certain franchises under legislative authority, as, for example, the foreclosure of a railroad mortgage which covers the company's franchises, may not necessarily deprive the company of

[1] 8 Amer. & Eng. Ency. Law 634, 634*b*. [2] 8 Amer. & Eng. Ency. Law 634*c*.

all its franchises, including that of its corporate existence, for the surrender of this is not always a necessary part of the transaction. The legislative grant of power to sell, mortgage, and transfer property and franchises, while it includes generally the alienation of such franchises as are essential to the property, will not imply any more. The franchise to build, own, or manage a railroad is not necessarily a corporate right, but may be enjoyed by a natural person. Therefore, under a power to sell or mortgage the property and franchises of a company, it was held that the mortgagee, bondholders, or purchasers at the mortgage-foreclosure sale did not acquire as part of the substantial rights intended to be secured the franchise of corporate existence.

A right to mortgage franchises would be of little value could the mortgage only pass the corporeal property without the franchise. The necessary and just construction is that on the foreclosure of a railroad mortgage the purchaser acquires the right to operate the railroad; or he may exercise the franchise of using streets and of supplying a city with gas, where the mortgage foreclosed is that of the franchise of a gas company. When the power conferred is to mortgage effects, contracts, etc., the right would be useless did it not imply the right to mortgage the franchise, not, as already explained, the franchise to be a corporation, but those franchises which are appropriate to the nature of the property mortgaged.

Where a water company mortgaged, with covenants of warranty, "all the right, privileges, immunities, franchises, and powers which were granted in and by" a certain city ordinance, it was held that the mortgage covered all franchises owned by the company and enumerated in said ordinance, whether the same were in fact granted by the city or by the state.[1]

In Washington state a franchise granted by a city to an electric company *and its assigns*, authorizing it to erect and maintain in the streets poles with suitable cross-arms on which to string wires for transmitting electric currents, is a local easement, and therefore assignable without the consent of the city.[2]

875. Transfer of Franchise of Eminent Domain.—The transfer of this franchise cannot be made without legislative authority. A power given to a telegraph company to lease lines, fixtures, and apparatus has been held not a power to build new lines. So, too, a power authorizing a railroad to lease roads does not authorize the leasing of unfinished roads, or give to the lessee any power of eminent domain, but this right remains in the lessor, and the legislature may deal exclusively with the latter in amending charter provisions respecting it. On the other hand, one who purchases, at a judicial sale, an unfinished railroad, and who by the charter succeeds to all the estate and property of the original company, and to all its contracts, franchises, rights, privileges, and immunities, does thereby acquire the power of eminent domain. The right of a company to have the damages for the appropriation

[1] Andrews *v.* National F. & P. Works (C. C. A.), 61 Fed. Rep. 782.

[2] Commercial E. L. & P. Co. *v.* Tacoma, 50 Pac. Rep. 592.

of land to its uses assessed in a particular mode is not a franchise which passes to the purchaser of its property. It has been held to be a personal privilege of the company and not transferable.

876. Transfer of Franchises of Exemption from Taxation.—When a statute authorizes the sale of a railroad with all the rights, franchises, privileges, and immunities enjoyed by the defaulting company, it does not transfer an exemption from taxation because a new constitution prohibits such a grant. A foreclosure of a railroad mortgage executed under a power to operate "on the credit of a company and on the mortgage of its charter and works" confers on the purchaser only those franchises which have been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway, and to the right to make profit therefrom, and it does not include an exemption from taxation. The earlier decisions wherein the franchise of exemption from taxation has been held to be transferred by mortgage and sale were so decided because the terms of the statute and the surrounding circumstances indicated such an intention on the part of the legislature, and the same construction would be applied to-day where property is exempted without reference to its ownership.

When the exemption from taxation is not a corporate franchise in the sense that it is not necessary to the operation of the company's business, it is then to be classed with franchises, and has therefore been held to be included in the reservation, by the state, of power to withdraw the franchise of the corporation.[1]

An authority to mortgage the franchise of a corporation necessarily implies the power to bring the franchise so mortgaged to a sale. It has been held that authority to one company to purchase the franchise and property of another was implied authority to any corporation which was willing to sell. If a railroad company has authority to purchase and to sell all kinds of property of every nature and quality, and to incorporate its stock with that of another company, it may be held to have the power to sell the railroad to another company just authorized to purchase it. A mortgage which includes the franchise of a company does not invalidate its effect upon the property which the company has power to mortgage.

The question whether the authority permits a conveyance of franchise seems to be merely one between the state and the corporation, and a question with which third persons have nothing to do. Where the act of an electric street railway in crossing a railroad company's tracks on a public highway does not take property of the complainant, and does not work some damage to it, differing in kind from the damage which the complainant would suffer in common with the rest of the community, the railroad company has no right to an injunction merely because the respondent proceeds *ultra vires* or usurps a franchise.[2]

[1] 8 Amer. & Eng. Ency. Law 634*b*.

[2] Philadelphia R. Co. *v.* Wilmington Ry. Co., 38 Atl. Rep. 1067.

A provision in an act incorporating a water company that the act shall be void unless the work is completed in one year does not prevent the company from extending its works, after the expiration of the year, to meet the necessities of the town to which the water is furnished.[1]

877. Sale of Franchises on Execution.—At common law the franchise of a corporation cannot be seized and sold on execution, the reason being that franchises are intangible and incapable of delivery by the sheriff to the purchaser. Another reason often stated is that where franchises are granted for the furtherance of public purposes, creditors by enforcing their claims would render the corporation incapable of fulfilling its public duties. The latter reason is widely accepted as correct, but it need not apply to such property as is not necessary to the proper performance of those duties; nor need it be extended to the franchise of corporations as owe no such duties. Such questions may arise where a mortgage has been made which covers both the property and the franchise of the corporation. The cases show great confusion on the subject.

The common law has been changed by general and special statutes. By the constitutions of Illinois, Nebraska, West Virginia, Missouri, Arkansas, and Texas the rolling stock and movable property of railroads are declared to be personal property, and the legislatures can pass no laws exempting it from execution. When the sale of franchises is authorized by statutes, the authority to sell is derived solely from those statutes, and the sale can be made in no other manner than that pointed out therein.

Prior to the consolidation of the two cities a board of trustees held exclusive control and management of the New York and Brooklyn Bridge, and, by contract, had conferred upon plaintiff the privilege of maintaining its tube line across the bridge. It was held that this action was within the scope of their authority, and was binding on the commissioner who succeeded them, subject to his continuing power to regulate, manage, and maintain the bridge, and to his approval and reasonable regulations in respect to plaintiff's plans and manner of construction.[2]

By its act of incorporation plaintiff had received authority to construct and operate its pneumatic tubes within and between cities. It was held that this did not by itself authorize it to lay the tubes along the New York and Brooklyn Bridge without further authority from the officers in control thereof.[3]

878. Remedies against Corporations for the Enforcement of Public Duties—There are three remedies to be had for the enforcement of the public duties of a corporation. They are *mandamus*, *quo warranto*, and *indictment*. The action of mandamus against a railroad corporation to compel it to exercise its duties as a public carrier of goods and passengers is brought by the people through the attorney-general. It is also a proper remedy to compel a

[1] West Springfield *v.* West Springfield Aq. Co. (Mass.), 44 N. E. Rep. 1063.

[2] New York Mail & Newspaper Transp. Co. *v.* Shea, 51 N. Y. Supp. 563.

railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it upon the line of its road, or to compel the operation of a railroad notwithstanding there is a strike of its employees, and to operate its road when it threatens to abandon it. In order for a court to issue a mandamus the reciprocal right and obligation must be complete, legal, and perfect. If a company fails to use or abuses a public trust and the powers vested in it by the state, it is within the sound discretion of the attorney-general to determine whether to apply for a mandamus or to have the charter of the company annulled.[1]

A private person may, without the intervention of the attorney-general, move for a mandamus to enforce the performance of a public duty not due to the government as such. But the fact that an injured person has private remedies for the damages which he has suffered by neglect of the corporation to perform its duties precludes the state from its remedy by mandamus.

879. Extinguishment of Corporate Franchises.—The extinguishment of a corporate franchise, or the dissolution of the corporation, as it is often spoken of, may happen in several ways, viz: (1) by the expiration of the time limited in the charter; (2) upon the happening of a contingency prescribed by the charter; (3) by the surrender of the franchise to the state; (4) by act of the legislature; (5) by failure of an integral part of the corporation; (6) by forfeiture of the franchise in a proper judicial proceeding.

When the period of time during which a corporate existence was to continue has expired the corporation ceases to exist, and it cannot be continued even by the unanimous consent of the shareholders. The legislature cannot, by renewing the charter, revive the debts and liabilities owing to the original corporation. If it is expressly provided in the charter that the corporation shall exist for a definite period of time, and that its business shall be conducted throughout that period, a majority of the shareholders cannot shorten the period even with the consent of the state. If, however, the intention expressed in the charter be merely to provide a limitation upon the duration of the franchise, the majority of the shareholders may wind up the business of the corporation whenever they deem it expedient so to do.[2]

880. Extinguishment of Franchise on Contingency.—A franchise is sometimes granted where the charter requires that the existence of the corporation shall depend upon its performing or complying with certain requirements, which if they be not performed and complied with, the franchise is in express terms declared forfeited and terminated. In such case the non-performance or fulfillment of the requirements of the statute will cause an actual termination and dissolution of the company without any act on the part of the state.

881. Extinguishment by Surrender.—A private corporation may terminate its corporate existence by surrender of its franchises to the state. To effect

[1] 8 Amer. & Eng. Ency. Law 617.

[2] 4 Amer. & Eng. Ency. Law 295.

such a termination the surrender must be accepted by the state in order that the rights of creditors, and the possible right of taxation which the state itself may have, shall be protected. Many of the states provide by statute a means of voluntary dissolution. Non-user by a corporation of its franchise for a long period of time may raise a presumption that the franchise has been surrendered to the state. Neglect to elect officers and to perform corporate acts has been held not of itself to put an end to corporate existence. The disposal of all the property of a corporation or the ownership of all its shares by one person will not work a dissolution.

882. Extinguishment by Act of Legislature.—Under a clause of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts, the charter of a private corporation has been construed to be an executed contract between the state and the incorporators. The legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation. By reason of such construction it is customary to provide in special charters of corporations or in the general corporation laws that the state shall have the right to repeal, alter, or amend the charter in its discretion. If the power be reserved conditionally, as in the case of a certain event, the legislature may pass the repeal whenever the event comes to pass. Under a reservation permitting the legislature to alter the charter of a corporation the alteration must be reasonable and within the scope and object of the corporation as it was originally chartered. In determining whether an act of the legislature repeals a charter, the ordinary rules of construction are applied.

883. Extinguishment by Failure of an Integral Part.—A corporate franchise may become extinguished when it has lost an integral part of its organization, which the corporation itself has no means of supplying, and without which the corporate powers cannot be exercised. Such an extinguishment might occur in the case of a municipal or ecclesiastical corporation, and in the case of clubs and other societies where all of the members are dead or departed. It has been held that if the corporation refused to elect officers until all are dead who could make an election, the corporation is dissolved. Whenever a corporation is reduced to such a state as to be incapable of acting and continuing itself it is at an end.

Such an extinguishment could not occur in the case of a private corporation with transferable shares and whose officers are elected by the stockholders. In such a corporation the membership is always continued by the gift, sale, bequest, or descent of shares of stock. The shares of stock must belong to some person or persons, and those persons are the members of the corporation. Property is held not to be an essential or integral part of a corporation, and its existence is not terminated, therefore, by the insolvency of the corporation, nor by the appointment of a receiver, nor by proceedings in bankruptcy.[1]

[1] 4 Amer. & Eng. Ency. Law 302.

884. Extinguishment by Forfeiture.—A franchise of a company may be extinguished by forfeiture of its charter in a judicial proceeding where the cause of forfeiture is judicially ascertained and adjudged. The suit to determine the forfeiture must be at the instance and under the authority of the state. There are two modes of procedure at common law to enforce such a forfeiture: one by *scire facias*, the other by a writ of *quo warranto* or by information in the nature of *quo warranto*. Such suits are instituted when a corporation has been guilty of misuser or non-user of its franchise, or when it has departed from the objects for which it was created, or when it has been guilty of abreach of trust, and is therefore liable to have its franchise forfeited. If a corporation neglect to perform duties which it has assumed for the benefit of the public, or which have been imposed upon it by reason of public policy, it renders itself liable to forfeiture. Such duties have been required to be performed as a condition subsequent to the granting of the charter.

When a private corporation has become wholly insolvent and is prevented from carrying on its business with safety to its creditors and to the public, its affairs should be wound up. A failure on the part of the corporation to perform its duties in this respect may be punished by a dissolution at the suit of the state. It is not every wrongful act committed by a corporation that will revoke its charter, though a single act may be a ground for forfeiture. Repeated failures to act, which are not omitted willfully or negligently and which do not injure any one and are not expressly forbidden by the charter, will not be sufficient reason for a revocation of the charter.

885. Effect of Extinguishment.—When a corporation has lost its franchise by forfeiture, surrender, or otherwise, it wholly ceases to exist in the eyes of the law and will no longer be recognized as a corporate body. Debts either due to or from the corporation are extinguished, and suits which are brought by or against it are abated. In this country when a corporation is dissolved it is a rule that the capital or property and debts due to an ordinary trading and manufacturing corporation constitute a trust fund for the payment of creditors and stockholders. The courts will lay hold of such a fund wherever it may be found and apply it to the purposes of the trust, and they will never allow a trust to fail for want of a trustee. Many of the states have passed statutes providing methods whereby the affairs of corporations that have been dissolved may be wound up. They provide in some states that the company shall continue as a corporate body for the purpose of prosecuting and defending suits and winding up its affairs. In other states trustees or receivers are appointed for settling up the affairs of the company.[1]

886. Taxation of Franchises.—A franchise of a corporation is deemed to be property, and unless it is granted by act of Congress or expressly exempted it is taxable either as property or under the principle of excise. It has frequently been held that franchises, such as those of a water company, or of

[1] 4 Amer. & Eng. Ency. Law 308.

a bridge company, or of a railroad company, are property, and are as proper subjects of taxation as any other property.[1]

The United States courts have held many times that the charter of a corporation does not open to the state any source of revenue; that it creates a valuable property which, like all other property, the state may require to contribute to the support of the government.[2] The franchises of telegraph companies, water-works companies, steamboat and railway and other transportation companies have been held subject to tax. A company engaged in collecting, storing, and selling ice has been held not a manufacturing concern and therefore within the exception of companies subject to taxation.[3] The only limitation upon the exercise of the power to tax a franchise is in the discretion of the legislature.

Franchise taxes are measured or determined in a variety of ways: sometimes of the dividends earned, at other times by the capital stock issued, and in still others by the extent of business transacted. It may also depend on the net earnings or the gross receipts, or on the average amount of deposits, on the market value of the shares of stock, or on the amount of original stock actually paid in.

It is sometimes quite essential that franchise taxes should be distinguished from property taxes, but no satisfactory rule for making such a distinction has yet been established. One that is often adopted is that a tax according to valuation is a tax on property, while a tax imposed according to nominal value or measured by some standard of mere calculation may be a franchise tax. The distinction arises in cases of taxation of capital stock and of bank deposits, because if the tax be a franchise tax, then it cannot be avoided on the ground that the property of the corporation is otherwise taxed or that it is non-taxable.

887. Corporate Charters and Franchises.—The subject of franchises, if it be made to include charters of incorporated companies, is a broad one, and it would require a book of considerable size to undertake to treat it fully or in anything like a comprehensive manner for the use of lawyers. There are good books upon the subject of corporations to which the reader is referred if he desires to go technically into the law upon the subject. The purpose of this book is, and will be, to give to the reader a general knowledge of the law of real property and of franchises, and a particular and detailed knowledge of those subjects with which an engineer, architect, or surveyor has most to do and to deal. The subject of estates and of titles, and the transferring of property, or the interpretation, construction, and application of franchises, is the legitimate business of a lawyer and should not be undertaken by an engineer. The object of treating the subjects at all in this book is to give to the engineer, architect, or promoter such a general knowledge of the subjects

[1] 25 Amer. & Eng. Ency. Law 631, 632.
[2] Burroughs on Taxation 168.
[3] 25 Amer. & Eng. Ency. Law 634.

treated as shall enable him intelligently to understand the situation and to gather together such facts and conditions as will present a case fairly and clearly to the attorney of the project, that the latter may determine the questions of law without being required personally to inspect or investigate the site of the proposed works. If that object has been accomplished, the author may congratulate himself and will feel that he has done a good service.

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